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TRANSCRIPT OF RECORD

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SUPREME COURT OF THE UNITED STATES

Autumn Term, 1904

No. 539

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CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,  
PETITIONER.

A. D. SUMMERS, AS SPECIAL ADMINISTRATOR OF THE  
ESTATE OF CLARENCE T. HORN, DECEASED

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ON WRIT OF HABEAS CORPUS TO THE SUPREME COURT OF THE UNITED STATES

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(31,406)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 683

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,  
PETITIONER,

*vs.*

A. D. SCHENDEL, AS SPECIAL ADMINISTRATOR OF THE  
ESTATE OF CLARENCE Y. HOPE, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE  
OF MINNESOTA

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[fol. 1] **IN DISTRICT COURT OF STEELE COUNTY**

A. D. SCHENDEL, as Special Administrator of the Estate of Clarence Y. Hope, Deceased, Plaintiff,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant

**SUMMONS**

You the above named defendant, are hereby summoned and required to answer the Complaint of the plaintiff in the above entitled action, a copy of which Complaint is hereto annexed and herewith served upon you, and to serve a copy of your Answer to said Complaint upon the subscribers at their offices at 419 Metropolitan Bank Building, in the City of Minneapolis, County of Hennepin, and State of Minnesota, within twenty days from the service of this Sum-[fol. 2] mons upon you, exclusive of the date of such service; and if you fail to so serve a copy of your Answer to said Complaint upon the subscribers within the time aforesaid, the plaintiff will apply to the Court for the relief demanded in said Complaint.

Dated this 21st day of February, 1923.

Davis & Michel, Plaintiff's Attorneys, 419 Metropolitan Bank Bldg., Minneapolis, Minnesota.

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**IN DISTRICT COURT OF STEELE COUNTY**

[Title omitted]

**BILL OF COMPLAINT**

Plaintiff for a Complaint in the above entitled action alleges and shows to this court:

1st. That defendant now is and at all times herein mentioned has been a railroad corporation duly organized and existing, and as such [fol. 3] operating commercial lines of railroad in the States of Minnesota, Iowa, and other states, hauling freight and passengers thereon as a common carrier for hire.

2nd. That on and previous to the 4th day of February, 1923, the above named Clarence Y. Hope, deceased, was employed by defendant as its agent and servant and as a railway freight conductor, and as such it was a part of his duties to be in railway cabooses of defendant, and to do the work commonly and ordinarily done by railway freight conductors.

3rd. That on the 13th day of February, 1923, the above named Clarence Y. Hope died intestate near the City of Chariton, Iowa, and left him surviving, as his heirs at law his widow, Jessie Hope, his son, Harry R. Avitt, his daughter, Ada M. Avitt, and his daughter, Dorothy L. Avitt.

4th. That thereafter and on the 20th day of February, 1923, the above named plaintiff, A. D. Schendel, was by the Probate Court of Hennepin County, a court having jurisdiction duly appointed as Special Administrator of the Estate of Clarence Y. Hope, deceased, and as such duly filed his oath and bond and in all things qualified as such Special Administrator and is now the duly acting and qualified Special Administrator of the estate of Clarence Y. Hope, deceased, and as such Special Administrator brings this action for and in behalf of Jessie Hope, the widow of Clarence Y. Hope, deceased, and Harry R. Avitt, Ada M. Avitt, and Dorothy M. Avitt, the children of Clarence Y. Hope, deceased.

5th. That at the time of the injuries to and the death of decedent, [fol. 4] as herein set forth, defendant was a railroad corporation engaged and working in interstate commerce; and that at the time of the injuries to decedent, he was working for defendant as its agent and servant and as such was engaged in interstate commerce.

6th. That on the 4th day of February, 1923, while decedent was employed, as aforesaid, it became and was necessary for him and it was his duty to act as a railway freight conductor on one of defendant's trains, which said train ran into and through the Village of Pershing, Iowa; that on the 4th day of February, 1923, at about 12:30 P. M., it became and was necessary for decedent, acting in the line of his duties and within the scope of his employment, to be in, around, and about the caboose of said train; that while plaintiff was so working, as aforesaid, the defendant, its agents and servants, wilfully, wantonly, negligently, recklessly and carelessly ran a certain locomotive, with a train of cars attached, into and against said train upon which decedent was so working, with great force and violence, derailing the said caboose, and hurling decedent through the air a considerable distance; that while decedent was so working in and about said caboose, within the line of his duty and scope of his employment, the defendant, its agents and servants, knew and in the exercise of ordinary care should have known, that decedent was so in said caboose, but notwithstanding, defendant, its agents and servants, negligently failed to exercise proper care or to take any reasonable precautions for decedent's safety; that the defendant, its agents and servants, negligently ran said locomotive into and against [fol. 5] said train at a high and dangerous rate of speed and without any notice of warning to decedent; and that because and by reason of each and all of the acts of negligence herein set forth, decedent was so severely injured that he died shortly thereafter.

7th. That because of being so injured, decedent died on the 13th day of February, 1923, that at the time of his death decedent was the sole means of support and maintenance of his said widow, Jessie

Hope, and his said children, Harry R. Avitt, Ada M. Avitt, and Dorothy L. Avitt, were dependent upon him for their care, support and maintenance.

8th. That prior to his injury and death decedent was an able-bodied man, well, strong, and healthy, and could and did earn as a railway freight conductor approximately Two Hundred Fifty (\$250.00) Dollars per month; and that by reason of his death damages have resulted to plaintiff, as the Special Administrator of the estate of Clarence Y. Hope, deceased, in the sum of Forty-five Thousand and (\$45,000.00) Dollars, which decedent would have contributed to the care, support, and maintenance of his widow, Jessie Hope, and his children, Harry R. Avitt, Ada M. Avitt, and Dorothy L. Avitt, had he not come to his untimely death as herein set forth.

For a second and further cause of action herein plaintiff alleges and shows to this court:

1st. Plaintiff re-alleges each and every allegation, matter and thing contained in paragraphs 1st, 2nd, 3rd, 4th, 5th, 6th, and 7th of his first cause of action herein.

2nd. Plaintiff alleges that after decedent was so injured, on the [fol. 6] 4th day of February, 1923, he survived and was conscious until the 13th day of February, 1923, upon which date he met his death as aforesaid; that on the 4th day of February, 1923, decedent was severely scalded and burned over all of his body, and he was severely injured about his head, neck, body, arms and legs, and he suffered great and severe pain and anguish of both mind and body from the time of being so scalded, burned, and injured to the time of his death; and that by this action plaintiff, as Special Administrator of the Estate of Clarence Y. Hope, deceased, seeks to recover for and in behalf of Jessie Hope, Harry R. Avitt, Ada M. Avitt, and Dorothy L. Avitt the sum of Fifteen Thousand (\$15,000.00) Dollars as damages compensatory for the conscious pain and suffering to decedent from the time of said injuries to the time of his death.

That by reason of all the facts aforesaid, plaintiff has been injured to his damage in the sum of Sixty Thousand (\$60,000.00) Dollars.

Wherefore, Plaintiff demands judgment against defendant for the sum of Sixty Thousand (\$60,000.000) Dollars, together with the costs and disbursements of this action.

Davis & Michel, Plaintiff's Attorneys, 419 Metropolitan Bank Bldg., Minneapolis, Minnesota.

[Title omitted]

## ANSWER

Answering plaintiff's complaint, defendant admits that it was and is a railway corporation organized under the laws of the States of Illinois and Iowa and that it operated and operates a line of railroad through the State of Minnesota and Iowa and other states, that it was and is a common carrier. Defendant also admits that on and previous to February 4, 1923, Clarence V. Hope was employed by this defendant as a railway freight conductor and that on such date while in the employ of this defendant near the Village of Pershing and within the State of Iowa, he received certain injuries which resulted in his death on or about February 13th, 1923.

All other allegations in the complaint contained, the defendant denies in whole and in part.

[fol. 8] Further answering, the defendant avers that said injuries and death of plaintiff's decedent were due to his own neglect and want of care and that such neglect and want of care contributed to said injuries and death and that on and prior to February 4th, 1923, he assumed the risk of his injuries.

Further answering, this defendant specifically denies that the said plaintiff's decedent was at the time of his injuries engaged in interstate commerce. On the contrary, this defendant avers that said plaintiff's decedent was at the time he received said injuries engaged and employed by this defendant wholly in moving traffic within the State of Iowa and that at said time he was engaged wholly in intrastate commerce.

Further answering, defendant avers that plaintiff's decedent was at the time of said injury a resident of the State of Iowa and that his aforesaid employment was referable to the laws of the State of Iowa and that said contract of employment was to be performed therein and all of the duties and liabilities of the parties were at all times during the term of his said employment governed and controlled by the said laws of the State of Iowa and said contract of employment was made and performed in contemplation of the application of said laws to said contract of employment.

Further answering, this defendant avers that at the time of said injuries to said plaintiff's decedent, there were in full force and effect certain public statutes or laws of the state of Iowa duly enacted by the law-making body of said state, to-wit: the General Assembly [fol. 9] thereof, and duly approved by the Governor of said State, the same being Title XII, Chapter 8-A, Supplement to the Code of 1913, as amended by the 37th and 38th General Assemblies and hereinafter in this answer referred to as the Workmen's Compensation Law of the State of Iowa. Said Workmen's Compensation Law of the State of Iowa, as the same existed on February 4th, 1923, and for a long time prior thereto, is set forth verbatim in Exhibit A, which is hereto attached and made a part hereof.

Further answering, the defendant avers that both defendant and plaintiff's decedent, in compliance with the terms and conditions of said Workmen's Compensation Act have elected to be bound by the terms thereof and that the rights and obligations of the parties are determined by said Workmen's Compensation Law and not otherwise and that plaintiff should be entitled to recover only the damages provided in said act and not otherwise in proceedings brought thereunder.

Wherefore, defendant prays that plaintiff take nothing by this action and that defendant have judgment for its costs and disbursements.

O'Brien, Stone, Horn & Stringer, Attorneys for Defendant,  
1116 Pioneer Building, St. Paul, Minnesota.

Exhibit A was a copy of the Iowa Workmen's Compensation Act, since this is printed in full at pages 91 to 140 of the Record, it is not printed here.

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[fol. 10]      IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

#### REPLY

Plaintiff for a Reply to the Answer of the defendant in the above entitled action alleges and shows to this Court:

Plaintiff denies each and every allegation and each and every part thereof in said Answer contained except as the same admits the allegations contained in plaintiff's Complaint.

Wherefore, Plaintiff demands judgment as prayed for in said Complaint.

Dated this 16th day of March, 1923.

Davis & Michel, Plaintiff's Attorneys, 419 Metropolitan Bank  
Bldg., Minneapolis, Minnesota.

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[fol. 11]      IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

#### SUPPLEMENTAL ANSWER

For its supplemental answer to plaintiff's complaint the defendant avers:

At the time of the death of said deceased, Clarence Y. Hope, he was a married man and left him surviving as his sole and only dependent his Widow Jessie Hope, also known as Mrs. C. Y. Hope.

On or about March 2, 1922, the defendant above named and said Jessie Hope, also known as Mrs. C. Y. Hope, having failed to reach an agreement in regard to the compensation under said Iowa Workmen's Compensation Law, the above named defendant did notify the Industrial Commissioner of the State of Iowa of such fact and did file with said Industrial Commissioner an application for arbitration as provided by said act. The said Jessie Hope, also known [fol. 12] as Mrs. C. Y. Hope, was given due and personal notice of the filing of such application and thereafter and on or about March 9, 1923, said Jessie Hope, also known as Mrs. C. Y. Hope, duly appeared and filed her answer to the said petition for arbitration. Thereafter a committee of arbitration, as provided by such Iowa Workmen's Compensation Law, was duly appointed and the hearing before such arbitration committee duly fixed for March 20, 1923, at Chariton, Iowa, of which hearing due notice was given to all interested persons, including the said Jessie Hope, also known as Mrs. C. Y. Hope.

Pursuant to such notice said hearing was duly had before such arbitration committee on said date and at said place and after hearing the evidence adduced, said arbitration committee did on March 23, 1923, make and file its findings and decision, where it was determined—

1. That on February 4th, 1923, C. Y. Hope was in the employ of the Chicago, Rock Island and Pacific Railway Co. as a freight conductor.

2. That on February 4th, 1923, while C. Y. Hope was engaged in taking his train from Pershing, Iowa, to Chariton, Iowa, which train at the time consisted of engine and caboose only, such train was struck by a passenger train and in resulting wreck the said C. Y. Hope suffered fatal injuries.

3. That such fatal injuries suffered by the said C. Y. Hope arose out of and in the course of his employment by the Chicago, Rock Island & Pacific Railway Co.

4. That at the time of his fatal injuries the deceased was not engaged in interstate commerce.

[fol. 13] 5. That by reason of the findings set out in Paragraph 4, the case is governed by the provisions of the Iowa Workmen's Compensation Law.

6. That by reason of the findings set out in Paragraph 3, the widow of the deceased is entitled to recovery under the Iowa Workmen's Compensation Law.

7. Wherefore, the Chicago, Rock Island and Pacific Railway Co. is hereby ordered to pay Mrs. C. Y. Hope compensation under the Iowa Workmen's Compensation Law at the rate of \$15.00 a week for 300 weeks, starting as of the date of death. The Chicago, Rock Island & Pacific Railway Co. is also ordered to pay the statutory medical, surgical and hospital and burial benefits and to pay the costs of this hearing.



On or about March 26, 1923, and within five days after the filing of such findings and decision, said Jessie Hope, also known as Mrs. C. Y. Hope, did file a notice of appeal to and claim for review by the Industrial Commissioner of the State of Iowa, and thereafter and on April 24, 1923, pursuant to said notice of appeal and claim for review, said Industrial Commissioner duly notified all interested parties, including said Jessie Hope, also known as Mrs. C. Y. Hope, that review proceedings under the notice of appeal by her would occur and be heard on May 4, 1923, at 9 A. M., at the office of the Industrial Commissioner in Des Moines, Polk County, Iowa. Thereafter said Industrial Commissioner did at said time and at said place and pursuant to such notice duly proceed to hear said appeal and claim for review, at which hearing the said Jessie Hope personally appeared and thereafter did on May 9, 1923, make and file his decision upon such review and appeal, whereby he did in all things affirm the decision of said arbitration committee. Said decision of said Industrial Commissioner has never been reversed, modified or set aside, but on the contrary is in full force and effect.

The defendant pleads said proceedings before said arbitration committee and said Industrial Commissioner of the State of Iowa as res adjudicata and as determinative of the rights of the plaintiff and defendant in this cause, and avers the fact to be that said proceedings are public acts, records and judicial proceedings of the State of Iowa and as such are entitled to full faith and credit in this Court under Section 1 of Article IV, of the Constitution of the United States. The defendant was at all times herein stated and is ready, able and willing to pay to said Jessie Hope, also known as Mrs. C. Y. Hope, the full amount awarded her by said findings and decision of said arbitration committee as affirmed by said Industrial Commissioner, and hereby tenders the same to her.

Wherefore, defendant prays that plaintiff take nothing by this action and that defendant have judgment for its costs and disbursements.

Due a- personal service. Admitted May 23, 1923.

O'Brien, Stone, Horn & Stringer, Attorneys for Defendant,  
St. Paul, Minnesota.

[fol. 15] IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

#### SECOND SUPPLEMENTAL ANSWER

For its second supplemental answer herein, the defendant avers that at the time of his death said Clarence Y. Hope was a resident of Polk County, Iowa, and that at all times herein stated the District Court of Polk County, Iowa, was and still is a court of record of said state duly vested by the Constitution and laws of the State of Iowa with general jurisdiction to hear and determine causes and

controversies of every kind and nature and also with jurisdiction to administer the estates of deceased persons and to appoint administrators of such deceased persons.

Said Clarence Y. Hope died on or about February 13th, 1923, a resident of said Polk County, Iowa, leaving property therein, and [fol. 16] thereafter one E. R. Byers was duly appointed administrator of his estate by said District Court of Polk County, Iowa.

Thereafter and on or about May 14, 1923, said E. R. Byers, as administrator of the Estate of Clarence Y. Hope commenced an action as such administrator against this defendant upon the same identical cause of action set forth in the complaint herein and that said action is still pending and undetermined.

This defendant avers the fact to be that the above named plaintiff has no right or title to any cause of action against this defendant under the so-called Federal Employers' Liability Act on account of the death of said Clarence Y. Hope but that any such cause of action under said act (although the defendant denies the existence of any such cause of action), belongs to said administrator appointed by the District Court of Polk County, Iowa. Because of the facts herein stated this plaintiff has no right to prosecute this action.

Further answering, the defendant avers that on or about May 17th, 1923, Mrs. Clarence Y. Hope, also known as Jessie Hope appealed to the District Court of Lucas County, Iowa, from the findings and award of the arbitrators as affirmed by the Industrial Commissioners, as set forth in this defendant's first supplemental answer, and that thereafter said matter came duly before said Court on said appeal, and thereafter and on June 2nd, 1923, said District Court of Lucas County, Iowa, did duly enter its judgment and decree wherein and whereby it did in all things affirm said findings of [fol. 17] said arbitrators as affirmed by said Industrial Commissioner. Defendant pleads said judgment as res adjudicata and as a bar to plaintiff's alleged cause of action herein and avers the fact to be that this Court is required under the Constitution of the United States to give full faith and credit to said judgment and that a failure of this Court to give such full faith and credit will be a denial to this defendant of its constitution rights in that behalf.

Wherefore, Defendant Prays That Plaintiff Take nothing by this action and that defendant have judgment for its costs and disbursements.

Due and personal service. Admitted June 5, 1923.

Davis & Mitchel, Attorneys for Plaintiff. O'Brien, Stone, Horn & Stringer, Attorneys for Defendant, St. Paul, Minnesota.

[fol. 18] IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

### Settled Case

#### CAPTION

It is hereby certified, that heretofore, to-wit, on the 4th day of March, 1924, at 9:00 A. M., the above entitled cause came on for trial and argument before the Honorable Fred W. Senn, District Judge, and a jury, in the Court Room, in the Court House, in the City of Owatonna, in Steele County, Minnesota.

#### APPEARANCES OF COUNSEL

Messrs. Davis & Michel, St. Paul, Minnesota, and Messrs. Leach & Leach, Owatonna, Minnesota, appeared for the plaintiff.

Messrs. O'Brien, Horn & Stringer, St. Paul, Minnesota, and Mr. F. A. Alexander, Owatonna, Minnesota, appeared for the defendant.

And thereupon the following proceedings were had, viz:

[fol. 19] COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Stringer: The defendant moves the court for a continuance of this case, on the following grounds:

That there are not to exceed twenty-four jurymen on the panel called for this term; of those twelve sat upon the case of Elder against the same defendant, a cause of action occurring out of the same accident as is involved in this case; that the records in the two cases are identical, except as to the measure of damages, if any; that all of the remaining jurors on the panel were present in the court room and heard all of the testimony in the Elder case, and for that reason it is improper that a jury selected from the present panel should hear the case at bar.

I take it counsel will stipulate that the record in the two cases is as I have indicated, and may the record show, if your Honor please, that the facts I have stated with respect to the panel of jurors are correct?

Mr. Davis: No, I will not, and the statement made by counsel that the entire rest of the panel were present in court during the trial I deny and there is nothing before this court to sustain it. And I desire to also say that counsel for the Railroad Company, when the Elder case was tried, asked the counsel for the plaintiff whether we expected to try the Hope case and we told him we did and our

clients would be here, and he said he would be ready to try the case. Now, we are willing to try this case either with a special venire or this same jury, and counsel can fully inquire of the jury whether or not the facts as heard in the Elder case would prejudice them or make up their minds or whether it would foreclose them from giving the defendant a fair trial. But I wish to state that the woman is supporting her children, working out at a dollar a day, and the only effort of the Railroad Company is to put this thing off to starve her out, and I am opposed to it as an unjust and inhuman act. And furthermore, your Honor the courts of Iowa are seeking by injunction and every other process known to deprive the woman and children of their rights. We are here and now is the time to try that case, and if this court, your Honor, feels that the present panel that is objected to by counsel is not the jury to try this case, let's have a special venire and let's end this case. We feel that counsel is not in a position to urge a continuance in this case, after having acquiesced and agreed to try it, and our witnesses and clients are here and we subpoenaed our witnesses, and if they return to Iowa we probably can never get them again, and in the discretion of the court we are perfectly willing that the court now order a special venire to try this case if he feels that this present panel—and I think that this jury should be interrogated and inquired about, and if the court feels—I don't think any of this present jury that tried this case undoubtedly made up their minds as to an issue in the case, or to say that the balance of the jury here felt that way, why that goes beyond the facts. Now, in order to give this defendant a fair trial, I am perfectly willing, if the court feels that the interest of justice demands it, that a special venire be drawn by the sheriff and by the proper officer and we precede to trial.

Mr. Stringer: I wish the record to show, however, that the defendant did not agree to try this case at this term, although it is admitted that counsel advised us that he expected to go to trial at this term.

Mr. Davis: Well, I think you will admit that you asked me yourself whether or not we expected to try the Hope case and I said that we did and you said you would get ready for trial.

Mr. Stringer: Yes, I will admit that, and I am ready for trial. The only reason for the request is the grounds that I have indicated.

The Court: I think the case should not be continued at this time and the motion will be denied. I want counsel to have a fair trial—to have a fair and impartial jury in this court and I think perhaps it would be proper to exclude from this jury the members of the panel who sat on the Elder case.

Mr. Davis: I think it would.

The Court: And the remainder of the panel may be called and any insufficiencies supplied by the sheriff. It would be difficult at this time to draw a special venire from the box and go out and get the jurors from over the county.

Mr. Davis: Well, couldn't it be done by tomorrow morning? If counsel wants to wait, I can.

The Court: As far as the remainder of the panel are concerned, I recall that last Saturday, after the jury in the Elder case were impanelled, the remaining jurors of the panel were excused. I presume they were about the court room yesterday during the remainder of the trial, but it does not seem to the court that that should disqualify this jury from sitting on this case, even though the facts are similar.

Mr. Davis: Very well, we are ready to *proceed*.

[fol. 22] The Court: The record may show that the court ordered the sheriff to return a special venire of twelve jurors to supply the deficiency upon this panel.

(Intermission while the sheriff called a special venire. Jury selected and sworn, and at 1:30 P. M. Mr. Davis made his opening statement to the jury.)

(Letters of administration marked plaintiff's exhibit 1.)

---

MYRTLE HANLON, called and sworn as a witness for and in behalf of the plaintiff, testified as follows:

Mr. Davis: Plaintiff offers in evidence exhibit one, being letters of administration—certified copy. I will state to the jury that these are the letters of administration and the appointment of an administrator—an administrator, which under the law must be appointed to prosecute the action and be a proper party plaintiff.

Q. Miss Hanlon, where do you live?

A. Williamson, Iowa.

Q. And are you now employed by the Rock Island?

A. Yes, sir.

Q. And you were subpoenaed here by us as a witness?

A. Yes, sir.

Q. And, Mrs. Hanlon, how long have you been employed by the Rock Island?

A. Seven years.

Q. In what capacity?

A. Operator.

[fol. 23] Q. As operator at Williamson, are you familiar with the coal mine nearer Pershing yard?

A. Yes, sir.

Q. And as operator at Williamson, you may state during these years whether it has been part of your work in the carrying on of the company's business to ascertain the cars through numbers and destinations which go out of that mine at Pershing yard?

A. Yes, sir.

Q. And during these years do you know from your experience in handling the company's business whether these yards have been switched or pulled, as you call it, practically every day of the week when they are running?

A. Yes; they pull coal from the mines.

Q. And when they pull coal from the mines, they pull loaded cars?

A. Yes, sir.

Q. Mrs. Hanlon, with regard to the coal which is pulled from the yards and placed on—at Pershing yards, are there tracks known as one and two?

A. There are.

Q. On the track one, what cars are placed there?

A. West bound.

Q. That mine is west from that point?

A. Yes, sir.

Q. And those on two are billed east?

A. Yes.

Q. Now, then, do you know whether or not during all the time you have been there whether cars going into the state or out of the state are all pulled either on one or two tracks?

[fol. 24] Mr. Stringer: That is objected to as irrelevant and immaterial.

The Court: Overruled.

Mr. Stringer: Exception.

Mr. Davis:

Q. You may answer.

A. I forgot what it was now.

(Question read.)

A. Yes, they are.

Q. No distinction is made between placing cars going out of the state or into the track on track one if they are going west, is there?

A. No.

Mr. Stringer: Same objection.

The Court: Same ruling.

Mr. Davis:

Q. And with regard to this mine, were you working on Sunday, February the 4th, 1923, and did you receive from Mr. Hope, as conductor, information with regard to certain cars which had been pulled out of that mine and placed on track one or two?

A. Yes I did.

Q. And I will ask you if you know from your handling of the company's business whether or not there were two loaded cars of coal billed from the mines to St. Joseph, Missouri?

Mr. Stringer: That is objected to as no foundation laid.

The Court: Answer that yes or no, whether she knows.

Mr. Davis:

Q. I will ask you, were there two cars of loaded coal for St. Joseph, Missouri, placed on those tracks. Do you know that?

Mr. Stringer: Objected to as no foundation laid.

Mr. Davis: Do you seriously contend that those St. Joseph cars were not placed on track one?

[fol. 25] Mr. Stringer: Well, I object to the question. I think it should be proven in the regular way by the record.

Mr. Davis:

Q. Mrs. Hanlon, you brought here at the request of the Railroad Company certain records, didn't you, in the case that was tried yesterday?

A. I didn't bring them; no, sir.

Q. Well, they were brought here then?

A. Yes, sir.

Q. Records made by you?

A. Yes, sir.

Q. And you came here as a witness for the Railroad Company in the case that was tried yesterday?

A. I did.

Q. And you were subpoenaed by us and required to testify here for us as a witness in this case?

A. Yes.

Q. Those records which you had are made from information conveyed by the conductor from manifests, are they?

A. Yes, sir.

Q. And who was the conductor who gave you that information on February 4th?

A. Conductor Hope.

Q. Was the conductor in charge of the switching operations at those mines that day?

A. Yes, sir.

Q. Have you these records now? I will ask you this,—in the switching of these mines, do you know what the custom and practice was of those crews, when they received orders to switch a mine, [fol. 26] whether or not they would complete the pulling out of the loaded cars out of that mine when they were required to switch the mine?

Mr. Stringer: That calls for an answer yes or no. Do you know?

A. I do not know.

Mr. Davis:

Q. Do you know from the work you did and the custom of doing the work whether or not as a rule and custom of doing the company's business you would receive information with regard to the condition of the tracks both in the forenoon and afternoon of various days?

A. Yes.

Q. And now these manifests that are received, are they received by the conductor from the mines?

A. Yes, sir.



Q. And those manifests, after being received by the conductor, do you know what his duties with those manifests is?

A. Well, he give them to us, or takes them to Chariton and mails them to us.

Q. That is in the usual handling and course of the company's business?

A. During the week he would give them to me.

Q. I say, that is in the usual handling and course of the company's business that he does that?

A. Yes, sir.

Q. And as I understand, when he would receive a manifest, for instance, cars, whether they went in or out of the state, or both, those manifests would be taken by him, if he was going to Chariton, to Chariton and then mailed by him, or under his direction, to you at Williamson?

A. Yes sir.

[fol. 27] Q. And that was part of his work to see that those manifests reached you at Williamson?

A. Yes.

Q. And it was part of the work of carrying on the business of the company, was it not?

A. Yes, sir.

Q. And did you ever receive those manifests for the list of cars that he 'phoned you that day?

A. No, I never did.

Q. Do you know what became of them?

A. I don't know, but I suppose that they burned up in his ca'oose.

Q. Well, you so testified at Des Moines that they were burned up, did you not?

A. That is what I say I think became of them.

Q. You never received them?

A. I sure didn't.

Q. And in the usual and ordinary course of handling the company's business you should receive them?

A. Yes, sir.

Q. And I will ask you this,—was it necessary for you to receive them in order to make out your bills of ladings and carry out the further transportation of those cars to their destination?

A. No; I believe he called——

Q. I say generally you would receive the manifest before you——

A. No; I would bill off the telephone.

Q. You would bill off the telephone. Were those manifests used by you on a check on your 'phone?

A. Yes.

Q. And those manifests would check up with the manifests you had made over the 'phone?

[fol. 28] A. Yes.

Mr. Stringer: I object to that as leading.

Mr. Davis:

Q. Now, Mrs. Hanlon, in the handling of this company's business did you ever receive manifests for these lists here?

A. No, I never did.

Q. And after you received the manifests which Mr. Hope or some other conductor would give to you, or send to you, what would you do with them? What would you do with the manifests?

A. I would check my telephone bills and file them away.

Q. And were they filed away as part of the records of the company in the handling of the company's business?

A. Yes, sir.

Q. Handing you exhibit 2, will you state what that is?

(List of car numbers on yellow paper marked plaintiff's exhibit 2.)

Q. Handing you plaintiff's exhibit 2, you may state what that is.

A. Well, it is the numbers and destinations of the coal he brought out at 9:30.

Q. It is the numbers and destinations of the coal he brought out of the mine at 9:30 that morning?

A. Yes, sir.

Q. I will ask you if in that exhibit one there is listed two cars, one L. & N. No. 62565, destined for St. Joseph, Missouri, and one K. C. S. No. 27783, destined for St. Joseph, Missouri?

A. Yes, sir.

Q. And do you know from the handling of the company's business and the information received by those, that those two cars were [fol. 29] two loaded cars for St. Joseph, Missouri?

Mr. Stringer: That is objected to as calling for the conclusion of the witness.

The Court: Objection sustained.

Mr. Davis: Exception.

Q. Now, do you know, where were those two cars billed to that I just read to you? Where did you bill them to?

A. St. Joseph, Missouri.

Q. And do you know from the handling of the company's business whether or not they went to St. Joseph, Missouri?

Mr. Stringer: Same objection,—calling for the conclusion of the witness.

The Court: Objection sustained.

Mr. Davis:

Q. Well, did you receive any reports back? Don't you receive reports back as to where cars are billed?

A. No.

Q. You billed them for St. Joseph, Missouri?

A. I expect, yes; yes, sir.

Q. And when you billed them, after you billed them, who were they turned over to?

Mr. Stringer: What do you mean, the cars?

Mr. Davis: The billings.

A. Well, the bills are given to the conductor that picks them up.

Q. Are the bills given to him before he picks them up?

A. No, sir.

Q. I mean the train that takes them out of Pershing yard, does the conductor who takes those cars out of Pershing yards have these bills before he pulls them out, or afterwards?

[fol. 30] A. He gets the bills at Williamson and goes down there and picks them up.

Q. And you people deliver the bills of lading or the shipping bills to him?

A. The bills; yes, sir.

Q. And you delivered to some conductor bills for two cars to St. Joseph. Did you ever read the numbers?

A. I couldn't say whether I did it or not.

Q. You know they were delivered in the course of the company's business?

A. I suppose they were, because I billed them.

Q. And I think that is all.

Mr. Davis: We offer exhibit two in evidence.

Cross-examination.

Mr. Stringer:

Q. As I understand you, the cars shown on the plaintiff's exhibit two were the cars that were brought in on the first track at 9:30 of that day?

A. Yes, sir.

Q. And this exhibit shows the correct number of the cars and the character of the destinations to which they were billed?

A. Yes, sir.

Q. Now, later in the day the conductor again 'phoned you, did he not?

A. 11:50.

Q. 11:50 that morning?

A. Yes, sir.

Q. And gave you a list of cars which he had brought in on the second track?

A. He did.

(Three yellow sheets with car numbers on them marked defendant's Exhibit "A.")

[fol. 31] Q. I show you defendant's Exhibit "A" and ask you if that is a list of the cars which the Conductor Hope brought in on the second track?

A. Yes, sir.

Q. And how did you get the information?

A. Over the telephone.

Q. From him?

A. At Pershing; yes, sir.

Q. Is that exhibit in your own handwriting?

A. It is.

Q. And does that exhibit show a correct list of the cars and the numbers of the cars and the destinations as given to you by him over the 'phone that day?

A. Yes, sir.

Q. The first exhibit, or the first number on this exhibit, is C 99271, and after it is the word "Allerton." Was that car later billed by you to Allerton?

A. Yes, sir.

Q. And where is Allerton?

A. Iowa.

Q. In the state of Iowa?

A. Yes, sir.

Q. The next car is C 100221, and after it V JCT. What does that mean?

A. Valley Junction.

Q. And where is Valley Junction located?

A. Iowa.

Q. Under, in the same column as appears Allerton and Valley Junction, are dashes after the remaining cars on this list. Where were those cars consigned to?

A. Well, that is all Valley Junction.

Q. Where you have those dashes under the word "Valley Junction" it is intended to be a ditto mark?

A. Yes, sir.

Q. And all refers to Valley Junction, Iowa?

A. Yes, it is.

Q. Were there any cars brought in on the second drag which were later billed by you outside of the state of Iowa?

A. No, sir; they were all billed to Iowa.

Q. On plaintiff's Exhibit Two, in the last column, appears the word, "V Jet." What does that mean?

A. Valley Junction.

Q. That car was consigned by you to Valley Junction?

A. Yes, sir.

Q. In the state of Iowa?

A. Yes, sir.

Q. Under that there is a line referring to the next car?

A. That is ditto.

Q. That means ditto. That was Valley Junction also then. After the third car is the word "Ar." What does that mean?

A. Allerton, Iowa.

Q. After the next three cars, under that same column, are dashes. What does that mean?

A. That is ditto.

Q. All those were billed to Allerton, Iowa?

A. Yes, sir.

Q. After the next car is the word "V Jet." I take it that means Valley Junction?

A. Yes, sir.

Mr. Stringer: I offer in evidence the other exhibit.  
[fol. 33] Mr. Davis: No objection.

Mr. Stringer:

Q. As I understand you, you never got the billing on these at all?

A. I never got the manifests.

Q. Or the manifests, I mean?

A. No, sir.

Q. And you made the billing from these two exhibits, plaintiff's Exhibit Two and defendant's Exhibit "A"?

A. I did.

Q. I guess that is all.

Redirect examination.

Mr. Davis:

Q. How long before Mr. Hope was injured in this wreck did you receive that last message from him?

A. I received it at 11:50.

Q. And he was injured about 12:17, was he not?

A. I think so. It was shortly after twelve o'clock.

Q. And there is a booth or place there or 'phone furnished by the company for 'phoning this information?

A. Yes.

Q. And this Pershing yards is listed as a station on the Rock Island, is it not?

A. Why, I suppose so. I never thought—

Q. What is its number and initials?

A. O. D. 27.

Q. O. D. 27. And it is a point at which orders are received by train men in operation of trains, is it not?

A. Yes, sir.

[fol. 34] Q. And those orders are received and transmitted by whom to the conductors at that point?

A. By the train dispatcher.

Q. And do the conductors in working or entering upon the main line have to get orders from that train dispatcher before entering the main line?

A. Yes, sir.

Q. And at that point this is a place where orders are received, giving them authority or the right to enter upon the main line?

A. Received by the conductors.

Q. And without such authority they cannot enter the main line, can they?

A. No, sir.

Q. And do those orders, do you know, from your experience there,

whether they are given with reference to the arrival or departure of other trains, the orders to go upon the track?

A. Yes; they usually do.

Q. And the right or privilege of allowing a conductor at that point to go upon the main line is governed by the arrival and departure of other trains?

A. Yes, sir.

Mr. Stringer: That is objected to as irrelevant and immaterial, not within the issues in this case.

The Court: Overruled.

Mr. Davis:

Q. And is that the main line of the Rock Island?

A. You mean running through there?

Q. Yes.

A. It is; St. Paul to Kansas City.

Q. That is, from St. Paul, Minnesota, to Kansas City, Missouri?

[fol. 35] A. Yes, sir.

Q. And all freight and passenger trains running from St. Paul, Minnesota, to Kansas City, Missouri, pass on that main line,—is that correct?

A. Well, I don't know.

Q. Over the Rock Island line?

A. Well, I don't suppose; no, they don't all run through there.

Q. The Kansas City passenger train does pass on that?

A. Yes.

Q. On the Rock Island, what train is that known as?

A. Well, there is four first-class, you mean?

Q. Well, the one that ran into this caboose?

A. Well, 69.

Q. 69, is a train running from St. Paul, Minnesota, to Kansas City, Missouri,—is that correct?

A. Yes, sir.

Q. And runs over this main line past Pershing siding?

A. Yes, sir.

Q. And from there west into Chariton?

A. Yes.

Q. I think that is all.

Mr. Stringer: That is all.

SAM WOODS, called and sworn as a witness for and in behalf of the plaintiff, testified as follows:

Mr. Davis:

Q. State your full name.

A. Sam Woods.

[fol. 36] Q. You were the engineer of the extra work train or switch train that day that Mr. Hope was injured?

A. I was.

Q. Who was your conductor?

A. C. W. Hope.

Q. As such conductor did he have charge of the movement of your engine?

A. He did.

Q. You may state to the jury whether or not you worked under instructions from him as to what you did and where you went?

A. We did.

Q. And on this day in question you were switching some mines, were you?

A. Yes, sir.

Q. And you, in switching those mines, you would haul different loaded cars from the mines and take them up to Pershing yards?

A. Yes, sir.

Q. And there they would be placed upon a side track, the storage track?

A. Yes, sir.

Q. And this was as Mrs. Hanlon testified, tracks one and two?

A. Yes, sir.

Q. The west bound placed on one and the east bound on two?

A. Yes, sir.

Q. Now, Mr. Woods, after having switched there and around about 12.30, you may state whether or not an order was given to you, or delivered to you, giving you permission to go onto the main line track to go to Chariton?

A. It was.

[fol. 37] Q. Will you produce that order?

(Train order marked defendant's Exhibit Three).

Q. Now, handing you exhibit, plaintiff's Exhibit Three, you may look at it and state if that is an order delivered to you?

A. It is.

Q. Giving you authority to go upon the main line?

A. It is.

Q. By whom was it delivered to you?

A. C. W. Hope.

Q. At the time he would receive that order, would he also receive a copy similar to it for his own use?

A. Well, he should; yes.

Q. He would deliver one to you and retain one himself?

A. Yes, sir.

Q. And that would be the authority for him to enter upon the main line?

A. Yes, sir.

Mr. Davis: We offer in evidence Exhibit Three.

Mr. Stringer: No objection.

Mr. Davis: That reads, ladies and gentlemen, "12.09 p. m., C. W. Hope." That represents Conductor C. W. Hope?

A. It does.



Mr. Davis: "No. 912 engine unknown and all eastward extras wait at Chariton until 1.30 p. m."

Q. What would that mean? Would that mean that all trains going east would not leave Chariton until 1.30?

A. It would.

[fol. 38] Q. No matter where they came from, whether inside or out the state?

Mr. Stringer: Objected to as irrelevant and immaterial.

The Court: Overruled.

(No answer.)

Mr. Davis:

Q. Now, then, the latter part of the order, "All first-class trains due Pershing before 12.10 p. m. have arrived or left." You may state to the jury whether that would mean and be information to you and Mr. Hope that you had a clearance on that track and that there were no trains approaching from the east?

A. It would.

Q. And would that part of it, "All trains due \* \* \* arrived or left," have reference to both trains to go out of the state or trains in the state, or both?

Mr. Stringer: Objected to as irrelevant and immaterial and not within the issues.

The Court: It is proper to inquire about the trains. I think it immaterial whether they were out of the state or in the state.

Mr. Davis:

Q. Would it apply to all trains from the east?

A. It would.

Q. And were there some trains from the east that did go out of the state?

Mr. Stringer: Objected to as irrelevant and immaterial.

The Court: He may answer.

Mr. Davis:

Q. You may answer.

A. Yes.

Q. Yes. And what train ran into you?

A. No. 69.

Q. What train was that?

[fol. 39] A. It was the Kansas City—St. Paul train.

Q. Passenger train?

A. Yes, sir.

Q. From St. Paul, Minnesota, to Kansas City, Missouri?

A. Yes, sir.

Q. And did this order, Exhibit Three, given you a preferential right of way over that or any other train from the east?

Mr. Stringer: Objected to as calling for the conclusion of the witness.

The Court: I think it is proper for the witness to explain the order.

Mr. Davis: Yes.

Mr. Stringer: He has explained it two or three times.

Mr. Davis:

Q. I will ask it in this way, Mr. Woods, when you received that order, you may tell the jury whether that gave you any preference as to entering the main line?

A. It did.

Q. And what right did that give you, after you received that order?

A. It gave me the right to move from Pershing to Chariton.

Q. Yes, over the main line?

A. Yes, sir.

Q. And you may tell whether or not in giving you the right to move from Pershing to Chariton, whether or not any other train, no matter what train it was, would have any right to use that track while you were on the way?

Mr. Stringer: That is objected to as calling for a conclusion and irrelevant.

The Court: Overruled.

[fol. 40] Mr. Davis:

Q. You may answer.

A. It just gave you the right to use that track from there to Chariton; east bound train couldn't come against you.

Q. What do you mean, east bound train couldn't come against you?

A. Well, couldn't leave Chariton until that order was dead by limitation of time or place.

Q. What about west bound trains after you got that order?

A. West bound trains?

Q. Yes, coming to Chariton?

A. Well, the dispatcher takes care of that part of it himself.

Q. I understand. In what way does he take care of it?

A. He sees when we clear at Chariton or the—or the O. S. is in there.

Q. What do you mean by the O. S. is in there?

A. Well, the operator notifies the dispatcher that extra 1574 is there.

Q. At Chariton?

A. Yes.

Q. And now, then, until he is notified of that, what about trains coming from the east, coming onto that main line between Pershing siding and Chariton, after you receive that main order, what do they—

A. Well, it was in the yard limit where it struck and the freight

trains would have to come through there under control, but the passenger trains doesn't.

Q. Now, when this passenger train came, did you have any notice or warning it was coming?

A. No, sir.

[fol. 41] Q. And the collision ensued?

A. Yes, sir.

Q. And Mr. Hope was injured?

A. Yes, sir.

Q. Did you see him immediately after he was injured?

A. No, sir.

Q. I think that is all.

The Court: What direction were you traveling from Pershing to Chariton

A. West.

Mr. Davis:

Q. And you were still in the Pershing yard at the time this collision occurred?

A. We were inside the yard limits; yes, sir.

Q. That is all.

Cross-examination.

Mr. Stringer:

Q. At the time the collision occurred you had no train attached to your engine?

A. Nothing but the engine and caboose.

Q. Nothing but the engine and caboose; and carrying no traffic?

A. No, sir.

Q. At the time you went to work that mine you received an order, authorizing you to do it, did you not?

A. Yes, sir.

Q. Have you got that order with you?

A. I have.

(Train order marked defendant's Exhibit "B").

Q. I show you defendant's Exhibit "B." Is that the order that you went to work on in the morning?

[fol. 42] A. It is.

Mr. Stringer: I offer it in evidence.

Mr. Davis: No objection.

Mr. Stringer: We will read it into the record, "Train order J 10. Des Moines, Feb. 4, 1923. 'To C. & E.'"

Q. I suppose that means conductor and engineer, don't it?

A. It is.

Q. "Engine 1491 and engine 1574, at Chariton, 6:50 a. m. Engine 1491 and engine 1574 work 7:30 a. m. until 1:00 p. m. between Chariton and Williamson, protecting against each other and against second-class trains. All extras west wait at Williamson until 1:00 p. m. All extras east wait at Chariton until 1:00 p. m. All extras east complete time 6:50 a. m. By B. F. Y. Montgomery Operator."

Q. Then, as I understand you, that last exhibit I offered you, number "B," was the order you went to work on in the morning?

A. It did; it was.

Q. And that order expired by limitation of time at 1:00 p. m.?

A. It did.

Q. And after you got back to—where was it you were going when the accident occurred?

A. Chariton.

Q. After you got back to Chariton, you couldn't move out of Chariton until you got another order?

A. No, sir.

Q. And you have no idea what kind of an order you would get?

A. No, sir.

[fol. 43] Q. Or where you would be ordered to go?

A. No.

Q. You might have been ordered down to Melcher?

A. We might have; yes, sir.

Q. It very often happens that in the afternoon—in the morning you will work at one place and in the afternoon be ordered somewhere else?

A. Yes, sir, we have been.

Q. And at the time you were going home you had no idea where you were going to be that afternoon?

A. We did not.

Q. Or what work you were going to do?

A. No, sir.

Q. You never had received an order for the afternoon work?

A. No, sir.

Q. That is all.

Redirect examination.

Mr. Davis:

Q. So far as this order is concerned, this is merely, Exhibit "B," an order giving you the right to go upon the main line track?

Mr. Stringer: Objected to as leading—very leading.

Mr. Davis: Well, I will ask the court the privilege of leading. I think in the interest of justice that we should be allowed to lead this witness, an employee of the company, in order to give this jury the truth in the operation of this train.

The Court: I think we can go by the regular rules.

[fol. 44] Mr. Davis:

Q. In regard to this order, I will ask you to state whether or not it had anything to do with work you were going to do at the mines?

A. It did not.

Q. And so far as any work you were going to do at the mines, this order had nothing to do?

Mr. Stringer: Objected to as very leading.

The Court: Objection sustained.

Mr. Davis:

Q. Did this have anything to do with your work outside of giving you the right to use the main line?

A. No, sir.

Q. And on this order your time did not expire, as I see it, until one o'clock?

A. It did not.

Q. And your wreck occurred at what time?

A. Along about 12:17.

Q. Along about 12:17. And you had quit your work, as I understand it, under this order, at the time your accident occurred?

A. That was the work order; yes, sir.

Q. And the only work order delivered to you?

A. Yes, sir.

Q. Now, in switching these mines at that time, I will ask you if you know, from your experience, whether or not it frequently occurred that you would switch those mines, working into noon and then go to Chariton and return in the afternoon?

A. We had—we have worked the mines in the morning and go some place else in the afternoon, as the dispatcher saw fit to direct.

Q. And haven't you also gone back to the mine?

[fol. 45] A. We have; yes, sir.

Q. And which do you do the most frequently, go back to the mine when you started in the morning, Mr. Woods?

Mr. Stringer: That is objected to as immaterial.

The Court: Overruled.

Mr. Davis:

Q. Just answer the question.

A. It was according to the way the work was at the mine, or what he wanted us to do in the afternoon.

Q. I understand, but I say now in the last month you would start in to switch that mine in the morning, how frequently would you say you did not work in the afternoons, if there was work to do there and were ordered other places?

A. Well, it wasn't very often.

Q. No; the general practice was to switch the mines, if you started in the forenoon, both forenoon and afternoon, wasn't it? That is true, isn't it?

Mr. Stringer: That is objected to as very leading.

The Court: The question is leading.

Mr. Davis: I know it is, your Honor. It seems to me with an employee that we certainly should have that right to lead. I don't know how it is——

The Court: I think he will answer the questions that he is asked.

A. Yes; we most generally go back and switch, if we had any work to do there.

Mr. Davis:

Q. You do know that all the cars at that mine hadn't been pulled out that day, do you?

[fol. 46] Mr. Stringer: Objected to as leading.

Mr. Davis: Withdrawn.

Q. Do you know whether any cars loaded that hadn't been pulled out at the mine?

A. Yes.

Q. You may tell the jury whether it is customary when you pull the mines to pull all the loaded cars out and place them on the tracks at Pershing siding?

A. Yes.

Q. And you hadn't pulled them all out that day, had you?

A. No.

Q. And you were going in at that time to get water for your engine, weren't you?

Mr. Stringer: That is objected to as leading.

Mr. Davis:

Q. Well, were you going in to get water?

Mr. Stringer: Same objection.

The Court: Overruled.

Mr. Davis:

Q. You may answer.

A. Yes, sir, we were going in to get water and dinner.

Q. And unless, if this mine hadn't been entirely switched, I will ask you whether or not it is a fact that unless you got orders to go elsewhere it would be the duty of Mr. Hope to complete the switching of that mine? Is that a fact?

A. Unless we got different orders to go some place to work?

Q. Yes.

A. Yes, it would have been his duty to have cleaned up the work at the mine.

Q. Now, you didn't get any order to go anywhere else, did you?

[fol. 47] A. No.

Q. And the only order after you got to Chariton that you would

have to get in order to go back and complete switching the mines would be an order to go on the main line to Pershing siding?

Mr. Stringer: Objected to as very leading.

The Court: Objection sustained.

Mr. Davis:

Q. Now, what order would you have to get, in order to go back to Pershing siding?

A. We would have to get another running order.

Q. Would that running order have anything or say anything with regard to what work you would do at the mine?

A. No, sir.

Q. I think that is all.

Recross-examination.

Mr. Stringer:

Q. You couldn't have moved out of Chariton without getting a switching order, as you spoke of?

A. No, sir.

Q. Well, then, your movements were wholly under the control of the operator?

A. Under the control of the dispatcher.

Q. The dispatcher. And if he had wanted to send you back in the afternoon to pull any more cars from the mines, he would have had to send you an order to that effect?

A. He would have had to give us running orders from Chariton to the mine.

Q. And you couldn't move out of Chariton until you got such an order?

A. No.

[fol. 48] Q. In fact, you couldn't move anywhere until you got such an order?

A. No, sir.

Q. And that order would tell you where to go?

A. It would.

Q. That is all.

Re-redirect examination.

Mr. Davis:

Q. And it wouldn't tell you what to do when you got there, would it?

A. Where do you mean, at the mine?

Q. Yes.

A. It wouldn't tell me; no.

Q. And the order would be a similar order to this white order, would it?

Mr. Stringer: That is objected to as leading.



Mr. Davis:

Q. I will ask you this, would the order that you received from the dispatcher, if you were to go back to the mine, be an order giving you the right of way to go to Pershing?

A. Yes, sir; it would give you the use of the track from Chariton to there.

Q. And you receive no order at any time that day and know of no order not—telling you not to finish switching the mines, did you?

A. No; I never received no order from the time——

Q. Yes. That is all.

The Court: Are you satisfied to have the witness take the exhibits, the train orders?

Mr. Davis: Yes, your Honor. We have copies of them from the other trial.

[fol. 49] FRED A. ELDER, called and sworn as a witness for the plaintiff, testified as follows:

Mr. Davis:

Q. State your full name.

A. Fred A. Elder.

Q. And, Mr. Elder, were you formerly employed by the Rock Island system?

A. Yes, sir.

Q. And in what capacity?

A. As brakeman.

Q. Were you employed with them on February 4th, 1923?

A. Yes, sir.

Q. On that day what were you working at?

A. Switching the mines.

Q. Where were those mines?

A. Located between Chariton and Williamson.

Q. Were you injured in the wreck?

A. Yes, sir.

Q. And are still suffering from it?

A. Yes, sir.

Mr. Stringer: Objected to as irrelevant and immaterial.

Mr. Davis: Only as to his experience, Mr. Stringer.

Q. Mr. Elder, who was the conductor in charge of that operation?

A. C. Y. Hope.

Q. Did you know C. Y. Hope in his lifetime?

A. Yes, sir; about nine years.

Q. And in doing this work in switching the mines, for how long a time before this had you been working at that work of switching the mines?

A. Well, near four years.

[fol. 50] Q. And during that time, do you know from your ex-

perience and the method and manner of the company's handling the work how those mines were switched?

A. Yes, sir.

Q. I wish you would tell the jury, if you can, if you received orders to switch the mine, what would be done by your crew after receiving the order with regard to switching the mine.

A. Well, we would pull the loads all out and put the empties in before we would figure we was finished.

Q. Now, then, was the custom in switching those mines to pull out all the loads when you were ordered to switch the mine, as near as you could, to wind up this work, to complete this work?

A. Yes, sir.

Q. And did you have orders that day to switch this mine?

A. Yes, sir.

Q. And had you completed the switching of the mine at the time of this injury?

A. No sir; we had not.

Q. But had you completed this work?

A. No, sir.

Q. And will you tell the jury whether or not there were other cars in the mines to be switched?

A. Yes; there was cars in there and had to take cars back in—empties.

Q. You were subpoenaed here by the plaintiff to testify in this case, I think?

A. Yes, sir.

Q. And when were you subpoenaed?

A. Yesterday, I believe it was.

Q. And you are enjoined, I believe, by some court in the state [fol. 51] of Iowa from testifying in this case?

Mr. Davis: It appears in this action that pursuant to an order issued out of the District Court of Lucas County, Iowa, a copy of which said order is herein offered as a part of this motion, that the witness, Fred Elder, has been enjoined from testifying in the present case. It also appears that such order has been set aside by the District Court of Iowa and that an appeal has been taken by the defendant Railroad Company to the Supreme Court of Iowa and that a stay has been issued by the District Court of Iowa preventing the witness from testifying pending the determination of the appeal. The witness Elder has been subpoenaed by the plaintiff in this case, with a subpoena which we offer in evidence and make a part of this motion, and has been paid his mileage and one day's witness fees for attendance, and is now here in court in pursuance of and in response to such subpoena and has been sworn as a witness. The order upon which it is attempted to prevent the witness from testifying is so pending before the Circuit Court of Appeals of the United States for this Eighth Circuit, and we now ask the court to direct the witness Elder that in the opinion of the court the order made by the District Court of Iowa is void and directing the witness Elder to proceed and testify in this case under the subpoena served upon

him and because of the fact that this court has jurisdiction of the subject-matter and the parties to this action. And further, first, upon the ground that a subpoena was duly issued out of this court [fol. 52] as hereinbefore set forth and is now in evidence; and, second, upon the ground that the order issued out of the District Court for Lucas County, Iowa, is void and of no force and effect.

The Court: The court holds in this case that it has jurisdiction of the subject-matter and that the order of the District Court of Lucas County, Iowa, assumes to take from this court jurisdiction of the case and that it is void. The witness, Fred A. Elder, is under a subpoena of this court and is here in court pursuant to subpoena issued out of this jurisdiction and will be required to testify pursuant to and under such process.

Mr. Davis:

Q. Mr. Elder, you have been ordered not to testify in this case by an order from Iowa?

A. Yes, sir.

Q. I will ask you if you want to return to Iowa when you are through here testifying?

Mr. Stringer: Objected to as immaterial and irrelevant.

A. Yes, sir.

Mr. Davis: Now, if it please the court, we will ask the court to direct the witness, Fred Elder, to testify in this case on the showing we have made of subpoenaing him.

The Court: The witness, Fred A. Elder, will testify under the subpoena and process issued out of this court in this case.

Mr. Davis:

Q. Mr. Elder, on the day in question, who had charge of your crew?

A. C. Y. Hope.

Q. And under whose direction did you at all times work?

A. C. Y. Hope.

[fol. 53] Q. In the movement of cars and placing them upon tracks going upon main line tracks, or going from place to place, who gave you the orders and directions in regard to those matters?

A. The Conductor Hope would give them to me and the dispatcher to him.

Q. Had you received your orders from him?

A. Yes, sir; in regard to our work.

Q. And he was the man in charge of this engine and train?

A. Yes, sir.

Q. Now, when you were at the mines that morning, you may tell the jury whether or not you pulled out any cars from those mines?

A. Yes, sir; from number two mine we pulled eleven, got them to the main line. They were St. Joe, as I remember, four Allerton and, I think, five Valley Junction.

Q. There were two cars that you placed on track one for St. Joseph, Missouri?

A. Yes, sir.

Q. After doing that, did you pull some other cars out of the mine?

A. Yes, sir; from number three mine.

Q. And where did you place those?

A. We put eight on number two track and one Allerton on number one track.

Q. Now, did you do that work under the directions of Hope?

A. Yes, sir.

Q. Now, then, in handling this work, you may tell the jury whether or not you received manifests, showing initials and numbers of a car and its place of destination.

A. Yes, sir; at the mines.

[fol. 54] Q. And are those delivered to the conductor in charge?

A. The conductor in charge; yes, sir.

Q. Do you know from your experience and the number of years you worked there the custom and practice of handling these manifests by the conductor and what he does with them?

A. Yes, sir.

Q. What does he do with them?

A. He makes his whole report from the manifests.

Q. What does he do with the manifests?

A. Well, when they are—get to the main line and go to Williamson, when we first get to the main line, he would 'phone it in to the operator at Williamson; when we go through, why he would deliver the manifests.

Q. Is that part of his duty to deliver those manifests?

A. Yes, sir.

Q. And when you would go to Chariton he would—how would he transport them to the agent at Williamson?

A. He would mail them back that evening on No. 70.

Q. And was that part of his duty to forward these manifests to the agent at Williamson?

A. Yes, sir.

Q. And those manifests which he would forward, would they tell the cars placed on tracks one and two?

A. Yes, sir.

Q. Both cars going out of the state, as well as cars within the state?

A. Yes, sir.

[fol. 55] Q. If this wreck had not occurred and he delivered the manifests to the cars you handled that day, would there be included in them the two St. Joseph cars?

A. Yes, sir.

Mr. Stringer: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Davis:

Q. And where did you last see those manifests?

A. They were in the caboose in the train book.

Q. And was the caboose destroyed?

A. It evidently was. All I saw is the springs and a few other things of it.

Q. Was it fired by the—after the collision—

A. Yes, sir, it burned up.

Q. Now, then, those manifests, the last you saw was when you—on your way into Chariton, in the possession of the conductor?

A. They were in the conductor's wheel report—in his train book we call it.

Q. And you don't know at any time that he had mailed them or delivered them to Williamson of course?

A. No chance to mail them.

Q. Now, at Pershing siding, you may state to the jury whether or not there is a telephone station.

A. Yes, sir.

Q. And you may tell the jury whether or not the conductor received orders at that station with reference to the use of the main line.

A. Yes, sir, he did.

Q. And without an order from the dispatcher for the use of the main line, can the conductor take a train onto the main line?

[fol. 56] A. No, sir; not without other protection.

Q. Now, shortly before you left for Chariton, you may tell the jury whether or not you received any orders from Conductor Hope as switching the St. Joseph cars up the track on—did you receive orders from Mr. Hope to push these cars up on track one?

A. Yes, sir.

Mr. Stringer: Objected to as extremely leading and calling for the conclusion of the witness.

Mr. Davis:

Q. Tell the jury then what Hope told you to do with reference to these St. Joseph cars on track one?

Mr. Stringer: That is objected to as immaterial and hearsay.

The Court: Overruled.

A. He told us when we came out from number three mine to shove the Allerton cars against them in the clear about five or six car lengths so as to switch the train in the afternoon without shoving—

Mr. Stringer: I move to strike out the answer as hearsay, and I object to that last question.

Mr. Davis: It is an instruction from the course of business from the conductor.

The Court: The last question wasn't answered as I recall it. It came in such quick succession that I didn't get it myself.

Mr. Davis: Well, I think the last question has been answered and I started to ask a part of a question and stopped.

(Last question read.)

Q. Well, state then again what orders Mr. Hope gave you with regard to those cars on track one and if he said anything with regard to coming back and handling them after dinner.

[fol. 57] Mr. Stringer: I object to that part of the question,—coming back after dinner,—as hearsay. That isn't an order; that's a recital.

Mr. Davis:

Q. I am asking you to say what orders he gave you.

Mr. Stringer: Well, he did testify.

Mr. Davis:

Q. Will you now state again what answer he gave you with reference to those cars?

Mr. Stringer: I object to that as repetition.

The Court: Overruled.

Mr. Davis:

Q. Go ahead.

A. He told us when we came out to shove number one to the clear about five or six car lengths, so as to give us room to switch our next—

Mr. Stringer: I move to exclude the rest of that answer.

The Court: Motion denied.

Mr. Davis:

Q. Finish your answer.

A. Give us room to switch our next train when we came back after dinner, so we would not have to shove that train until night when we finished.

Q. Did Mr. Hope state that to you?

Mr. Stringer: Counsel didn't give me an opportunity, for the purposes of the record, if it please the court, for the purpose of the record I move to exclude the latter portion of that answer which tell what they were going to do in the afternoon.

The Court: Motion denied.

Mr. Davis:

Q. Now, then, Mr. Elder, after you received that order, did you—were those cars shoved back on track one?

A. We shoved them down to five or six car lengths.

Q. On track one?

[fol. 58] A. On track one.

Q. When those cars would be taken from track one, where would they be placed with reference to the east or west end of it?

A. We would put them clear on the west end.

Q. That is, down to the west end of the main line?

A. Yes, sir.

Q. And at that time they were placed there in order to set the brakes on the St. Joseph cars—and did you set the brakes on the St. Joseph cars?

A. I set the brakes on the three loaded cars, the first loaded one was Allerton and the next two were St. Joe.

Q. Was that the last work that Conductor Hope's crew did with reference—

A. That was the last thing we ever did.

Q. And after that did you uncouple from this string and couple your engine to a caboose?

A. We uncoupled our engine and went and got our caboose.

Q. Well, you uncoupled your engine and got your caboose. Did you know where Mr. Hope was?

A. He was getting our orders and phoning in the manifests.

Q. Was in the telephone booth?

A. Yes, sir.

Q. Where did Mr. Hope get on the train?

A. Just as we was going through the crossing over onto the main line.

Q. Now, then, when you went in there, do you know what you went into Chariton for?

A. We went in for water and our lunch.

[fol. 59] Q. Do you know what you went in for?

A. Yes, sir.

Q. What for?

A. Went in for lunch and water.

Mr. Stringer: Objection to as calling for the conclusion of the witness.

The Court: Overruled.

Mr. Davis:

Q. What was your answer?

A. We went in for lunch and water.

Q. Do you know whether or not from working about the engine that the engine had to have water?

A. Yes, sir.

Q. Could you get any water there at the mines?

A. No, sir; there ain't no water at the mines.

Q. Where were you to get water?

A. Either at Chariton or Williamson.

Q. And you know from any orders and directions from Hope whether or not you had to go back to those mines after dinner?

Mr. Stringer: Objected to as calling for the conclusion of the witness.

Mr. Davis:

Q. Answer that by yes or no.

The Court: Overruled.

Mr. Davis:

Q. You may answer.

A. I didn't get the question.

Q. Did you receive and get orders from Mr. Hope or directions as to where you were going after dinner?

A. Yes, sir.

Mr. Stringer: Objected to as calling for the conclusion of the witness.

Mr. Davis:

Q. Tell the jury what directions Mr. Hope gave you with regard to that.

A. We were going back to the mines.

[fol. 60] Mr. Stringer: Objected to as hearsay.

The Court: Overruled.

Mr. Davis:

Q. To what mines?

A. To number two and three.

Q. Do you know from the custom of doing work there, when you received orders to switch a mine, whether or not you would complete the switching of the mine, as a rule?

A. We generally worked until we completed our work.

Q. And did you receive any orders after you went to the mines to switch it not to switch the mines?

A. No, sir.

Q. A wreck occurred? A wreck occurred?

A. Yes, sir.

Q. You were rendered unconscious, I think?

A. Yes, sir.

Q. So you don't know what became of Mr. Hope?

A. No, sir.

Q. I think that is all.

Cross-examination.

Mr. Stringer:

Q. At the time of this wreck you had a lone engine and a caboose only?

A. Yes, sir.



Q. While you were shoving those cars on num-

Q. *That was he was—when I say 'phoning in manifests?*

A. Yes, sir.

Q. That was he was—when I say 'phoning in the manifests—I mean 'phoning in the substance of what was on the manifests.  
[fol. 61] A. To the operator in Chariton.

Q. And that was the cars that he was 'phoning in at that time were the cars brought in on the second drag?

A. Yes, sir.

Q. Because he at that time already phoned those on the first drag some two hours before?

A. Well, phoned them in if we did.

Q. He always phoned them in as soon as he got up there?

A. Yes.

Q. That is all.

Mr. Davis: That is all.

Mr. Davis: Now, might it be stipulated here, as it was in the other case, that Mr. Hope was injured, your Honor, in the employ of the detandant company and that his injury was proximately caused by reason of the negligence of the company in running a passenger train into the engine and caboose under the charge of Conductor Hope and that no claim is here made of the assumption of risk or contributory negligence?

Mr. Stringer: Yes, that is satisfactory.

Mr. Davis: And that this injury occurred on the 4th day of February, 1923, and that later Mr. Hope died from injuries received at that time?

Mr. Stringer: Well, I suppose he did. There is no doubt about it, is there?

Mr. Davis: No; I simply say that to save time.

Mr. Stringer: Well, I don't claim that he died from anything else.

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[fol. 62] IDA PRICE, called and sworn as a witness for and in behalf of the plaintiff, testified as follows:

Mr. Davis:

Q. Miss Price, where do you live?

A. Russel, Iowa.

Q. And are you a nurse?

A. Yes, sir.

Q. And you may state to the jury whether or not as a nurse you attended Mr. C. Y. Hope after his injury?

A. Yes.

Q. Where?

A. At the Yokum and Yokum hospital in Chariton.

Q. Do you know where he was when he died?

A. At the Yokum and Yokum hospital, Chariton.

Q. Did you see him after his death?

A. Yes; I was present with him when he died.

Q. You were present with him when he died?

A. I was present with him when he died.

Q. When was he brought in there?

A. Well, I came to him Sunday evening about seven o'clock.

Q. Now, at that time I wish you would tell the jury his condition.

Just turn and tell the jury the condition of Mr. Hope at that time as to injuries, burns and as to his general condition.

A. He was unconscious and had second and third degree burns extending from the waist line to the tip of his great toe and a head injury and a bruise on the side.

Q. Now with regard to the second and third degree burns, I wish you would explain to the jury—a first degree burn is a slight burn?

[fol. 63] A. Yes.

Q. And second degree is deeper?

A. Deeper.

Q. And a third degree is a burn through the entire skin?

A. Extend clear through the tissues.

Q. Extend clear through the tissues. And tell the jury the extent of the third degree burns over his body.

A. Of course, they were at different places. As I remember Doctor Yokum, there was few of them that were third.

Q. Few of them that were third and the other few would be second degree burns?

A. Yes, sir.

Q. When did he regain consciousness?

A. Never.

Q. Was unconscious all the time?

A. Yes.

Q. Did he ever talk?

A. Well, yes.

Q. He talked to you?

A. Yes.

Q. And talked to his family?

A. No.

Q. About what?

A. Railroad engine.

Q. Well, did he talk about the accident?

A. No.

Q. In talking about railroading, what did he talk about?

A. Oh, orders and going in and getting out. Never seemed to get anywhere.

Q. How?

A. Never seemed to get anywhere.

[fol. 64] Q. Well, was his wife present at any time?

A. Yes.

Q. Did he talk with her?

A. Not that I ever knew, to just know her, while I was in there.

Q. Well, were you in there all the time?

A. No, I was not.

Q. Well, now do you know whether or not he groaned or tossed in his bed?

A. Yes.

Q. Well, did he ever complain of pain?

A. Oh, in turning him, as I remember, in turning him we got the extra moan, nothing in the way of talking to us but we got that extra moan and hurt condition.

Q. In turning him?

A. Yes.

Q. And how long did he manifest pain by moaning?

A. Well, that evening to the afternoon he died.

Q. From the time he was brought into the hospital? From the time he was brought into the hospital?

A. Yes.

Q. Now, of course, during the times you were there I presume his wife called at the hospital, too. Did his wife call at the hospital?

A. Yes.

Q. And she would be with him at times?

A. Yes.

Q. And you don't know, of course, would you be there when she was there at times?

A. Some times, yes.

Q. And also she would be alone with him. I think that is all.

[fol. 65] Cross-examination.

Mr. Stringer:

Q. As I understand you, he was unconscious when you got there?

A. Yes.

Q. And he remained unconscious up to the time of his death?

A. Yes.

Q. When you say he talked about railroading, you mean he would make incoherent statements, do you not, Miss Price?

A. Not especially.

Q. Well, as I understood you to say, he was unconscious?

A. Yes.

Q. All the time?

A. Yes; not knowing what he was doing.

Q. What I mean by that is, when he would talk about railroading he wasn't carrying on a conscious conversation?

A. No, he was not.

Q. The talking was really of a really unconscious mind?

A. Yes, he was.

Q. He didn't know what he was doing at that time any of the time?

A. No, he did not.

Q. Never, from the time that you got there until he died?

A. He did not.

Q. That is all.

Mr. Davis: That is all.

[fol. 66] JESSIE HOPE, called and sworn as a witness for and in behalf of the plaintiff, testified as follows:

Mr. Davis:

Q. Mrs. Hope, you are the widow of C. Y. Hope?

A. Yes, sir.

Q. You were subpoenaed here yesterday as a witness?

A. This morning.

Q. And you are also under injunction in Iowa?

A. All I know the men they told me.

Q. Yes, papers were served on you?

A. Yes.

Mr. Davis: Now, we ask the court to, or assuming that a similar showing was made in the other witness, Elder, to direct the witness, Mrs. C. Y. Hope to testify in this case, and that this court has jurisdiction of the subject-matter and that she should proceed to testify.

The Court: The witness is under subpoena out of this court?

Mr. Davis: The witness is under subpoena out of this court.

The Court: The witness, Jessie Hope, having been subpoenaed under the process of this court, will be required to testify.

Mr. Davis:

Q. Mrs. Hope, after this accident when did you first see your husband?

A. When did I first see him?

Q. Yes.

A. It was about twenty-five minutes after one when I went to the hospital.

Q. At Chariton, Iowa?

A. Yes, sir.

[fol. 67] Q. Was he at that time conscious?

A. No, sir.

Q. Did you call on him from time to time from that time to his death?

A. I was there every day most of the time.

Q. During the times that you were there and talked with him did he regain consciousness at times?

A. There was at times he was conscious.

Q. What did he talk about with you when he was conscious?

Mr. Stringer: Objected to.

Mr. Davis:

Q. What would you talk about,—different matters?

A. Yes, sir.

The Court: Overruled.

Mr. Davis:

Q. Did he talk about family matters?

A. He asked me where the children was.

Q. In talking with you did he appear to talk connectedly and lucidly at times?

Mr. Stringer: Objected to as calling for the conclusion of the witness.

The Court: Objection sustained.

Mr. Davis:

Q. Now, then, from the time of his injury to the time of his death were there days, or every time that you called on him, were there times that he would talk with you?

A. Well, he would talk with me about—there was along the first part of the accident after it occurred that he didn't seem to realize, but the latter—

Q. Then afterwards, say for five days before his death, did he talk to you?

A. Yes, sir, he did.

[fol. 68] Q. And what kind of a conversation would it be as to being connected or otherwise?

A. Well I would often ask him where he was hurt and he would say across his chest there.

Q. And in talking that way, tell the jury whether he appeared to talk as he normally did when he talked to you?

A. Why, he did at times.

Q. Did he during the time you saw him ever complain of pain?

A. Yes, he did.

Q. And did you ever notice on occasions as to whether he would lay or toss in bed or wreak with pain?

A. I should say he did.

Q. Just describe what he did there at that time to the jury.

A. Well, he seemed to be in just so much agony that there was times that we had to hold him in bed.

Mr. Stringer: I move to strike out the answer as a mere conclusion.

Mr. Davis: I think it does. We consent.

The Court: Motion granted.

Mr. Davis:

Q. Just tell the jury what he would do, that is, his actions or motions.

A. Well, he wanted to get up all the time.

Q. Well, when he would move did he exhibit any signs of pain?

A. Why, he couldn't be turned over.

Q. Why not?

A. Well, for the pain.

Q. How did you know that?

A. Well, whenever the nurse or any of the doctors—it always

[fol. 69] took two or three to raise him up—whenever they would want to change him—and it would take about three to raise him—he would just go nearly frantic, when they would move him, with pain.

Mr. Stringer: I move to strike out the answer as a conclusion.

Mr. Davis: I think the last part, "frantic with pain," should be—

The Court: Motion granted.

Mr. Davis:

Q. Mrs. Hope, during those times did you ever notice his face as to whether it was turned or otherwise?

A. Sure; he would lay and frown just like he was in terrible agony.

Mr. Stringer: I move to exclude that.

The Court: Strike it out.

Mr. Davis: I think that is all.

Q. How old was Mr. Hope?

A. He was forty-nine years.

Q. Well, was he in good health at the time of the injury?

A. Yes, sir; very best of health.

Cross-examination.

Mr. Stringer:

Q. You were married to Mr. Hope when?

A. The 28th day of November, 1922.

Q. So that you had been married about two months when he died?

A. Eleven weeks the day he died.

Mr. Davis: Do I understand you claim any materiality in that, counsel?

Mr. Stringer: Well, I want to get at the facts.

Mr. Davis: Well, do you claim any materiality?

Mr. Stringer: I think that is all.

[fol. 70] Redirect examination.

Mr. Davis:

Q. Mrs. Hope, during the time that he lived with you, you may tell the jury whether he was a man who stayed at home and stayed with his family.

A. He was.

Q. Was he kind to the children?

A. He was.

Q. And was he when he was off the road was he trying to be away from home or be at home?

A. No, sir; always at home.

Mr. Stringer: That is objected to as irrelevant and immaterial.

The Court: Overruled.

Mr. Davis:

Q. Mrs. Hope, with regard to his disposition and conduct at home, was it kindly or otherwise?

A. He was kind.

Mr. Stringer: Objected to as immaterial.

The Court: Objection sustained.

Mr. Davis: I think that is all.

Mr. Stringer: That is all.

Mr. Davis: Now, it may be stipulated in this case that the deceased, C. Y. Hope, contributed around—earned on the average of \$250.00 a month for a year prior to his death and that the widow and dependents of C. Y. Hope, deceased, received from his contributions on an average of from \$135.00 to \$150.00 per month.

Mr. Stringer: Well, Mr. Davis, I don't know anything about the latter. I wish you would ask her that. I don't know anything about it.

Mr. Davis:

Q. You were dependent upon Mr. Hope for the support and maintenance and the contributions he made to you?

[fol. 71] A. I was.

Mr. Stringer: But during the marriage relation, of course.

Mr. Davis: It may be understood that the contributions were made during their marriage relation and that at all times during the period of contributions that he was furnishing on an average—was earning on an average of \$250.00 a month.

Mr. Davis: Now, if it please your Honor, we offer to read into the evidence from the American Experience table of Mortality the expectancy of a man forty-nine years of age, showing that his normal expectancy would be 21.63 years, and offer the same as evidence of that fact. Any objection?

Mr. Stringer: No. Just let me—I didn't get the figures.

Mr. Davis: 21.63.

Mr. Davis: We now offer to read into the record from the Travelers' Insurance Company book the present value—that the present value of one dollar per year, due at the end of each year, invested safely, invested at the rate of four and a half per cent, the rate of four and a half per cent for twenty-two years, is \$13.78.

Mr. Stringer: What is it for twenty-one years?

Mr. Davis: For twenty-one years is \$13.40. The present value of one dollar at five per cent for twenty-one years is \$12.82 and for twenty-two years is \$13.16.

The Court: At five per cent?

Mr. Davis: At five per cent.

The Court: Less than at four and a half. Is that the way you read it?

Mr. Davis: No; \$13.16. Oh, yes, it is always less. Yes, that is [fol. 72] right. And at six per cent. for twenty-one years is \$11.76; for twenty-two years is \$11.76, and for twenty-two years \$12.04.

Mr. Davis: It is agreed that on the dependency, that no claim is made for the dependency of the children but that the contributions stipulated as being made, \$135.00 to \$150.00 dollars a month, was contributions made for the use and benefit of the widow, Jessie Hope, for which she was dependent. I think that covers it.

Mr. Stringer: Well that doesn't strike me as being very clear.

Mr. Davis: And that no additional claim is made for any dependency of the children.

Mr. Stringer: And that the administrator seeks no recovery here on their behalf.

Mr. Davis: And that the administrator seeks no recovery here on their behalf. All right. Anything else?

Mr. Stringer: No.

Mr. Davis: Plaintiff rests.

The Court: Take a fifteen minute recess.

Mr. Davis:

Q. Mrs Hope, what time did your husband die?

A. On the 13th day of February.

#### OFFERS IN EVIDENCE

(Certified copy of laws of Iowa marked defendant's exhibit C.)

(Certified copy of judgment marked defendant's exhibit D.)

Mr. Stringer: The defendant will offer in evidence defendant's exhibit C.

Mr. Davis: Objected to as incompetent, irrelevant and immaterial, not within the issues, no foundation laid.

Mr. Stringer: And in connection with that we offered in evidence [fol. 73] the defendant's exhibit D, being a certified copy of the judgment of the District Court of Lucas County, Iowa.—

Mr. Davis: That is objected to as incompetent, irrelevant and immaterial and not with the issues of this case.

Mr. Stringer: In an action entitled, Mrs. C. Y. Hope, claimant, the Chicago, Rock Island & Pacific Railway Company, defendant, wherein and whereby it was adjudged and decreed that the plaintiff's decedent C. Y. Hope, at the time he sustained his injuries, was engaged in intrastate commerce and was not engaged in interstate commerce.

The Court: I think I shall sustain the objection to the exhibits and reserve the question for future consideration. It seems to me



that it is quite important and that the court should take some time in investigating the matter, if the court has an opportunity to review it.

Mr. Stringer: It seems to me that for the purpose of the record it might be well to admit them but reserve the instruction to the jury as to the effect of them and—not permitting the jury to have them.

The Court: For the purpose of a motion, they are in the record. If counsel wants those exhibits in the record for the purpose of the motion, he may have them in the record for that purpose.

Mr. Davis: But I understand the court holds they are not material.

The Court: The court holds they are inadmissible.

[fol. 74] Mr. Stringer: As I understand the ruling of your Honor is this and that the record shows that while the court considers and your Honor is of the present opinion that the two exhibits C and D are inadmissible, yet they may be considered as being in the record to that extent, but no further; that if the defendant desires to make a motion for a directed verdict in whole or in part based upon said exhibits, that the exhibits may be considered in the record for that purpose, but for that purpose only.

The Court: That is correct. The record may show that the court will consider the exhibits for the purpose of the motion, as indicated.

(Paper marked defendant's exhibit E.)

(Paper marked defendant's exhibit F.)

Mr. Stringer: We offer in evidence defendant's exhibit E, being the exemplified copy of the proceedings in the District Court of Polk county, Iowa, and resulting in the appointment of E. R. Byers as primary administrator of the estate in Iowa.

Mr. Davis: That is objected to as incompetent, irrelevant and immaterial, no foundation laid, not within the issues, and is absolutely invalid and of no force and effect in this action.

Mr. Stringer: Also offer in evidence an exemplified copy of a certain proceedings of the District Court of Polk County, Iowa, brought by E. R. Byers as administrator of the estate of Clarence Y. Hope against this defendant.

Mr. Davis: Same objection.

Mr. Stringer: The reason why we offer it in evidence is to show that the administrator of the domiciliary estate has taken possession of that cause of action and that it doesn't float around the country [fol. 75] in the hands of any ancillary administrator that they see fit to appoint.

The Court: Objection sustained.

Mr. Stringer: May the record show that these exhibits are in the case for the same purpose, for the purpose of direction of a verdict, but for no other purpose, the same as the other exhibits?

The Court: The same ruling may apply to defendant's exhibits "E" and "F" as were made with respect to defendant's exhibits "C" and "D".

Mr. Stringer: We rest.

Mr. Davis: Plaintiff rests.

## DEFENDANT'S MOTION FOR A DIRECTED VERDICT

Mr. Stringer: Defendant now moves the court to instruct the jury to render a verdict in favor of the defendant and against the plaintiff on the ground that it clearly appears from all the testimony that the plaintiff's decedent was at the time of his injury engaged wholly in intrastate commerce within the State of Iowa and that he was not in any way engaged in interstate commerce, and that consequently any remedy in the premises arises not under the Federal Employers' Liability Act, under which this action is brought, but under the Workmen's Compensation Act of the State of Iowa.

On the further ground that the question of whether the plaintiff's decedent was at the time of his injury engaged in interstate commerce has been determined by the District Court of Lucas County, Iowa, by a final judgment, in which it was adjudged and decreed that the plaintiff's decedent was at the time of his injury engaged wholly in intrastate commerce and not in any way in interstate commerce; [fol. 76] and that such judgment of said Iowa court is res adjudicata of said matter and is a bar to the prosecution of this action; and that said judgment is entitled to full faith and credit in this court under the Constitution of the United States; and that if the court refuses to direct a verdict and to recognize said decision as res adjudicata and binding, it will operate to deny this defendant its constitutional rights under that provision of the Constitution of the United States which provides that full faith and credit to all judgments and judicial proceedings of a sister state shall be given by the courts of each other state.

On the further ground that it appears conclusively from the testimony that said Clarence Y. Hope was at the time of his death a resident of the State of Iowa and that the courts of said State of Iowa have appointed an administrator at the place of his domicile and that under the Employers' Liability Act of the United States any cause of action in the premises is vested in said domiciliary administrator, who alone has the right to prosecute any action for death under said Federal Employers' Liability Act, and is vested with said cause of action, and that this plaintiff as representative has no title to any cause of action arising out of the death of said Hope.

Mr. Davis: To the said motion and the whole thereof plaintiff respectfully resists.

The Court: Motions denied.

[fol. 77]

## CHARGE TO JURY

MEMBERS OF THE JURY: This is an action in which A. D. Schendel, as special administrator of the estate of Clarence Y. Hope, deceased, is the plaintiff, and the Chicago, Rock Island & Pacific Railway Company is the defendant.

The plaintiff brings this action under the Employers' Liability Act. That is an act of Congress that was passed for the benefit of

men who work on railroads, and who are engaged in interstate commerce, and so in this case upon the first issue that will be submitted to you the Federal Employers' Liability Act of Congress, will have to be considered by you and the issue under that act determined by you members of the jury.

Under this law every common carrier by railroad shall be liable in damages to any employee suffering injury while engaged in interstate commerce, or in case of the death of such employee to the surviving widow and children of such employee dependent upon him previous to such injury or death resulting in whole or in part from the negligence of any of the agents or employees of such carrier, or by reason of any defect or insufficiency due to the negligence of the carrier in its tracks and roadbeds. That is the part of the act that is here material in this case.

Now, the first question for your members of the jury to determine in this case is whether at the time the decedent, Clarence Y. Hope met his injury both the decedent and the defendant were [fol. 78] engaged in interstate commerce. That is the first question that you will consider. If you find that at that time the decedent, C. Y. Hope, was not engaged in interstate commerce, then the plaintiff cannot recover in this action, and in that event your verdict will be for the defendant. On the other hand, if you find that at the time in question the decedent was engaged in interstate commerce, you would find for plaintiff on that issue, and then you would proceed to determine the other issues in the case as the court will submit them to you later.

It is undisputed that the defendant in this case, the Chicago, Rock Island & Pacific Railway Company, is an interstate carrier by railroad and generally engaged in interstate commerce. The defendant contends that at the time decedent was injured the defendant was engaged purely in work not interstate in character and that the defendant and the decedent were engaged wholly in intrastate commerce. It is a question of fact for you to determine from all the evidence in the case whether or not the work in question was intrastate at the time decedent was injured.

An employee is engaged in interstate commerce when he has work directly with or about interstate cars or shipments; that is, cars or shipments going from one state to another. An employee may also be engaged in interstate commerce even though he be not working about such cars or shipments at the precise time he was injured and if his work was so closely and intimately connected with the general interstate work of the carrier as to be deemed in law a part of it. In other words, was the work of the employee, Clarence Y. Hope, at [fol. 79] the time of his injury, so closely related to the general interstate work of the railroad company as to be practically a part of it? Was his work being done independently of the general interstate commerce in which the defendant was engaged? Was his work a matter of indifference so far as the general interstate employment of the defendant was concerned?

These are questions which you should determine from all the

evidence which you have listened to in this case relative to the work being done at the time and just before Clarence Y. Hope was injured. If after a review of all of this testimony, you are of the opinion that decedent's work has no relation to the general interstate work of the carrier and that he was not engaged in interstate commerce, then your verdict should be for the defendant on that issue and that would end the case. On the other hand, if you believe from this evidence that the decedent's work was so closely connected with the general interstate work of the railroad company as to be deemed a part of it, and if you believe that such was not a matter of indifference to the defendant and was not being done independently of its interstate commerce, but that in fact it was so closely related to defendant's general interstate work as to be practically a part of it, then your verdict should be for the plaintiff on that issue, that decedent and defendant were at the time engaged in interstate commerce.

An employe going to or returning from work of an interstate character is engaged in interstate commerce if injured while on the premises of the employer.

[fol. 80] Now, that is the first issue, members of the jury, for you to determine, and you will distinguish interstate commerce as commerce between several states and intrastate commerce as commerce wholly within the state.

Now, as I have stated, if you determine that question and you say that the decedent at the time of the injury was not engaged in interstate commerce, then your verdict will be for the defendant. If you say that he was engaged in interstate commerce, then your verdict will be for the plaintiff. And upon that issue the burden of proof is upon the plaintiff, and the plaintiff must satisfy you by a fair preponderance of the evidence that he claims that he makes that the decedent at the time of the injury—at the time of the wreck—was engaged in interstate commerce. The defendant denies that the decedent at the time of the injury was engaged in interstate commerce.

Now, if you say that the decedent at the time of the injury was in fact engaged in interstate commerce, then you will go to the question of damages, because in this case the defendant admits that the decedent was injured on the 4th day of February, 1923, through the negligence of the defendant railroad company; and it is admitted in this case that he—or the evidence shows that the decedent, Clarence Y. Hope, died on the 13th day of February, 1923, as the result of the injuries that he sustained on account of the negligence of the defendant railway company. So that if you find that the decedent was engaged in interstate commerce, then by reason of those admissions on the part of the defendant railway company you go to the question of damages and determine what amount in dollars [fol. 81] and cents the plaintiff is entitled to as a verdict in this case.

The Congress of the United States has provided that in case of this character the right of action survives and that there may be a

recovery for the conscious pain and suffering of decedent from the time of his injury until his death. You will, therefore, determine from the evidence whether the decedent in fact suffered from conscious pain and suffering and the period or length of time of such conscious pain and suffering endured and continued.

If you find that the decedent did suffer such conscious pain, then you may, if you find for the plaintiff under the instructions given, that is, if you find for the plaintiff on the issue of interstate commerce which has been submitted to you, award the plaintiff such damages as you believe from all the evidence would compensate him for the conscious pain and suffering you find he endured from the time that he received such injury until the time of his death.

Under this law the right of action survives to the widow and next of kin of the decedent. You will figure in dollars and cents the amount that the plaintiff is entitled to for such conscious pain and suffering that the decedent endured from the time of his injury to the time of his death under this instruction.

That is the first element of damage that you will consider.

Under the law applicable to this case, the plaintiff, if entitled to recover, is entitled to recover also as damages, in addition to the damages compensating him for pain and suffering, such sums as [fol. 82] you find from the evidence will fairly and reasonably compensate the decedent's surviving widow, Jessie Hope, for the pecuniary loss she has sustained by reason of the death of her husband, C. Y. Hope. In arriving at this sum you have a right to take into consideration the earning capacity of C. Y. Hope, the amount he contributed to his wife, Jessie Hope, for her support, care and maintenance, his age, habits and state of health at the time of the injury.

Evidence has been introduced in this case to show the normal expectancy of life of a person forty-nine years of age to be 21.63 years.

This evidence should be considered by you in determining this question. It is not necessarily conclusive, as a person might live long beyond the period of his normal expectancy, or he might die long before such time; but you have the right to consider these tables as evidence in the case, and it is for you to determine from all the evidence in the case the length of time decedent would have lived and contributed to the support of his surviving widow.

When you have determined this and you have determined the amount of the annual contributions of the decedent to his widow, you should then reduce the sum you so find to its present value—the value at the present time. By present value is meant such sum which if put out at interest at a given rate would produce for the period of the expectancy the amount of the annual contribution and with the last payment both principal sum and interest would be exhausted. In other words, if, for example, the contributions were one dollar a year for a period of ten years, the jury would figure [fol. 83] what sum, if put out at a reasonable rate of interest, would produce one dollar a year for ten years, and with the last payment both principal and interest would be used up.

In this connection, evidence has been produced in this case to show the present worth or value of one dollar a year for different

periods. This evidence may be considered by you in arriving at the present worth of the annual contributions of the decedent to his widow, if you reach the question of damages in this case under the instructions given.

Upon the question damages also the burden of proof is upon the plaintiff to satisfy you by a fair preponderance of the evidence of the claims that the plaintiff makes with reference to the damages and the amount the plaintiff is entitled to as damages in this case. On the question of damages the court can give you no other guide than what I have given you. That is the guide that you are to follow in assessing damages in this case, and it is a matter within the sound discretion of the jury under the instructions here given to you as to what amount of damages, if any, the plaintiff is entitled to in this case.

Now, you members of the jury are the sole and exclusive judges of the facts in the case, of the credibility of the witnesses and the weight that you will give to the testimony of the various witnesses who have testified.

I believe there are several exhibits that are in evidence and you will take them to the jury room with you and consider those exhibits in connection with the oral testimony here given in court.

[fol. 84] Now, members of the jury, it is your duty to take the law from the court in this case, because it is the duty of the court to assume the law in the case. It is the duty of the jury to take the responsibility for the facts; you take the law from the court, apply it to the facts in this case and retire to your jury room and deliberate upon this case fairly and impartially and return your verdict into court.

There are two forms of verdict that will be submitted to you, a verdict for the plaintiff. If you find for the plaintiff under the instructions given, your foreman, whom you will select after you retire to your jury room, will sign the verdict and insert the date and you insert the amount of damages that you say the plaintiff is entitled to. If you find for the defendant, your foreman will merely insert the date and sign the verdict. Both verdicts have been prepared for your convenience.

During the first twelve hours of your deliberations your verdict must be unanimous. If you cannot agree during the first twelve hours, then you may return a verdict if ten or eleven of you agree, but in that event the ten or eleven of you who do agree must all sign the verdict, and in that event your foreman will not be required to sign it. If court is in session or the court is available when you have arrived at a verdict, the court will be here to receive it. If a verdict is returned at an unseasonable hour, I presume counsel will agree on a sealed verdict.

#### COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Davis: We will.

The Court: In that event, after you have agreed upon a verdict, your foreman may put your verdict in an envelope and seal it and

[fol. 85] take it with you and you may then separate for the night and then all return here in court tomorrow morning at the opening hour and return your verdict into court at that time.

The Court: Are there any suggestions on the part of counsel?

Mr. Davis: No suggestions at all. I believe that these exhibits, copies of them made, and they will be sent out, the train orders, they are exhibits. He took his originals. Those are not marked.

The Court: Is it agreed that the copies may go to the jury in lieu of the originals?

Mr. Davis: Yes.

Mr. Stringer: Yes.

The Court: All right. You may swear an officer.

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PLAINTIFF'S EXHIBIT NO. 1

STATE OF MINNESOTA,

County of Hennepin, ss:

Special Letters of Administration

A. D. Schendel of Hennepin County, Minnesota, is hereby appointed Special Administrator of the estate of Clarence Y. Hope, late of Lucas County, Iowa, deceased.

Witness, Hon. John A. Dahl, Judge of the Probate Court in the County of Hennepin, and the seal of the Court, affixed the 20th day of February, A. D. 1923.

By the Court.

John A. Dahl, Judge. (Probate Court Seal.)

[fol 86] STATE OF MINNESOTA,

County of Hennepin, ss:

PROBATE COURT

I, James G. Kehoe, Clerk of the Probate Court, within and for said County of Hennepin and custodian of the seal and records of said Court, do hereby certify that I have compared the foregoing copy of the record of the Special Letters of Administration, in the matter of the estate of Clarence Y. Hope, deceased, with the original records thereof now remaining in this office and have found the same to be correct transcripts therefrom, and of the whole of such original records. And I further certify that said exemplification would be received in evidence in all the Courts of the State of Minnesota.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at Minneapolis, in said County, this 20th day of February, A. D. 1923.

(Seal.) James K. Kehoe, Clerk of the Probate Court.

Defendant's Ex. A, Elder vs. C., R. I. & P. Plaintiff's Ex. No. 2,  
Schendel vs. C. R. I. & P.

[fol. 87]

PLAINTIFF'S EX. No. 2

3-4-24

C	No. 2		2-4
87544	MR		1181
	FB	84	347
	U Jet		834
C	MR 85		1253
88298	FB U Jet		325
80			928
C 87413	D B	U Jet	
C 86038	D		
C 89252		AR	
MWS 1191	D		
C 82499			
LON 77906	H		
C 88243	F	U Jet	
LON 62565	F	St. Joe	
KCS 27783	F	St. Joe	

DEFENDANT'S EX. A, SCHENDEL VS. C. R. I. & P.

3-4-24

W		Allebre	
C 99271	D	U Jet	
C 100221	F		
C 98251	F		
CGN 15533	F		
C 87021	F		
C 82785	D		
C 82324			
C 84220	D		
C 84322			
C 99750			
C	MR	95	1274
99780	DB		48
100	U Jet		856
[fol. 88]			
C	MR	96	1411
84322	DB		403
100	U Jet		1008
C	MR	97	1391
84220	DB		415
100	U Jet		976
C	MR	98	1365



82324		DB	413
		U Jet	952
C		MR	99 1660
82785		DB	482
100		U Jet	1178
C 99271		F	100 Allerton
C 100221		F	U Jet
C 98251		F	
VGN 15533		F	
C 87021		F	
C		MR	1444
82166		DB	409
100	121	U Jet	1035
C		MR	1367
84135		DB	397
100	122	U Jet	970
LVN 79127		Allerton	1463
100		MR	368
	123	HB	1098
KCFSM			
73782		LUP	1236
100		FB	394
			842
			Olnetz
C	124	MR	1366
83998			391
100		U Jet	9975
Ext. "D"			

## Manifest Burned Hope Caboose

2-4-23

[fol. 89]

PLAINTIFF'S EXHIBIT No. 3

Schendel vs. C. &amp; R. I. Ry. Co.

3-4-24.

The Chicago Rock Island &amp; Pacific Railway Company

The Chicago Rock Island &amp; Gulf Railway Company

Des Moines, Feb. 4, 1923.

Train Order No. 21

To C. &amp; E. Wk Extra 1574

Form) At Pershing

31 ) x. at 1209 P. M. C Y H Operator.

No. 912 eng unknown and all eastward extras wait at Chariton until 1:30 P. M. All 1st class trains due Pershing before 12:10 P. M. have arrived or left.

## B T

Repeated at 12:09 P. M. C. Y. H. Operator.  
Signed by Train made time Dispatcher Operator Hope Eng. 1574  
C O M 12:09 J. E. G. Hope  
P. M.

Copy of original.

[fol. 90]

## DEFENDANT'S EXHIBIT "B"

Schendel vs. C. & R. I. Co.  
3-4-24.

The Chicago Rock Island & Pacific Railway Company

The Chicago Rock Island & Gulf Railway Company

Des Moines, Feb. 4, 1923.

Train Order No. 10.  
To C. & E. Eng 1491 and Eng 1574.  
Form) At Chariton  
19 ) x. at 6:50 A. M. C D N Operator.

Eng 1491 and Eng 1574 work Seven Thirty 7:30 A. M. until  
One 1 P. M. Between Chariton and Williamson protecting against  
each other and against second 2nd class trains. All Extras West  
wait at Williamson until one 1 P. M. All Extras East wait at  
Chariton until One 1 P. M.

B Y

Made C. O. M. Time 6:50 A. M. By B. F. Y.

Montgomery Operator.  
Copy of Original.

## DEFENDANT'S EX. C

State of Iowa, Secretary of State

Schendel vs. C. R. I. & P.  
3-4-24.  
Defendant's Ex. G.  
Elder vs. C. R. I & P.  
3-3-24.

I, W. C. Ramsey, Secretary of State of the State of Iowa, do  
hereby certify that the attached booklet is published and distributed  
by the authority of the State of Iowa.  
[fol. 91] I do further certify that Pages 8 to 48 inclusive, of said  
booklet, constitute and are the statutes of the State of Iowa now in  
force and in full force and effect on the 4th day of February,  
1923, upon the subject of Employers' Liability and Workmen's  
Compensation as the original statutes remain of record in my office.

In testimony whereof, I have hereunto set my hand and affixed the official seal of the Secretary of State of the State of Iowa.

Done at Des Moines, this 4th day of June, A. D. 1923.

W. C. Ramsey, Secretary of State. (Seal.)

## Workmen's Compensation Law

### Text of Statute

Title XII, Chapter 8-A, Supplement to the Code, 1913, as Amended by the 37th, 38th, and 40th General Assemblies

### Part I

Section 2477-m. Employers—employees—exceptions. (a) Presumption—Employees excepted.—Except as by this act otherwise provided, it shall be conclusively presumed that every employer as defined by this act has elected to provide, secure and pay compensation according to the terms, conditions, and provisions of this act [fol. 92] for any and all personal injuries sustained, by an employee arising out of and in the course of the employment; and in such cases the employer shall be relieved from other liability for recovery of damages or other compensation for such personal injury, unless by the terms of this act otherwise provided; but this act shall not apply to any household or domestic servant, farm or other laborer engaged in agricultural pursuits, nor persons whose employment is of a casual nature. The provisions of this act shall not apply as between a municipal corporation, city or town and any person or persons receiving any benefits under, or who may be entitled to, benefits from any "firemen's pension fund" or "policemen's pension fund" of any municipal corporation, city or town.

(b) Compulsory.—Where the state, county, municipal corporation, school district, cities under special charter or commission form of government is the employer, the terms, conditions and provisions of this act for the payment of compensation and amount thereof for such injury sustained by an employee of such employer shall be exclusive, compulsory and obligatory upon both employer and employee.

(c) Rejection of Terms—Reasons for.—An employer having the right under the provisions of this act to elect to reject the terms, conditions and provisions thereof and (who) in such case exercises the right in the manner and form by this act provided, such employer shall not escape liability for personal injury sustained by an employee of such employer when the injury sustained arises [fol. 93] out of and in the usual course of the employment because:

(1) The employee assumed the risks inherent in or incidental to or arising out of his or her employment, or the risks arising from the failure of the employer to provide and maintain a reasonably safe place to work, or the risks arising from the failure of the em-

ployer to furnish reasonably safe tools or appliances, or because the employer exercised reasonable care in selecting reasonably competent employees in the business;

(2) That the injury was caused by the negligence of the co-employee;

(3) That the employee was negligent unless and except it shall appear that such negligence was wilful and with intent to cause the injury; or the result of intoxication on the part of the injured party.

(4) (d) Negligence Presumed—Burden of Proof—Notices of Election to Reject—Presumption on Failure to Give Notice.—In actions by an employee against an employer for personal injury sustained arising out of and in the course of the employment where the employer has elected to reject the provisions of this act, it shall be presumed that the injury to the employee was the direct result and growing out of the negligence of the employer; and that such negligence was the proximate cause of the injury; and in such cases the burden of proof shall rest upon the employer to rebut the presumption of negligence.

Every such employer shall be conclusively presumed to have elected to provide, secure and pay compensation to employees for injuries sustained arising out of and in the course of the employment [fol. 94] ment according to the provisions of this act, unless and until notice in writing of an election to the contrary shall have been given to the employees by posting the same in some conspicuous place at the place where the business is carried on, and also by filing notice with the Iowa industrial commissioner with return thereon by affidavit showing the date that notice was posted as by this act provided. Provided, however, that any employer beginning business after the taking effect of this act and giving notice at once of his desire not to come under the provisions of this act shall not be considered as under the act; provided, however, that such employer shall not be relieved of the payment of compensation as by this act provided until thirty days after the filing of such notice with the Iowa industrial commissioner, which notice shall be substantially in the following form:

#### Employers' Notice to Reject

To the employees of the undersigned and the Iowa industrial commissioner:

You, and each of you, are hereby notified that the undersigned rejects the terms, conditions and provisions to provide, secure and pay compensation to employees of the undersigned for injuries received as provided in the acts of the—(thirty-fifth) general assembly known as chapter—(one hundred forty-seven), and elects to pay damages for personal injuries received by such employee under the common law and statutes of this state modified by subdivisions one, two, three and four of section one, chapter—(one hun-

dred forty-seven) of the acts of the—(thirty-fifth) general assembly [fol. 95] and acts amendatory thereto.

(Signed — — —.

STATE OF IOWA,  
County, ss:

The undersigned being first duly sworn deposes and says that a true, correct and verbatim copy of the foregoing notice was on the — day of —, 19—, posted at — (state fully place where posted).  
— — —.

Subscribed and sworn to before me by — — —, this — day  
of —, 19—.

— — —, Notary Public.

The employer shall keep such notice posted in some conspicuous place which shall apply to the employes subsequently employed by the employer with the same force and effect and to the same extent and in like manner as employes in the employ at the time the notice was given.

Where the employer and employe have not given notice of an election to reject the terms of this act, every contract of hire express or implied, shall be construed as an implied agreement between them and a part of the contract on the part of the employer to provide, secure and pay, and on the part of the employe to accept compensation in the manner as by this act provided for all personal injuries sustained arising out of and in the course of the employment.

Sec. 2477-m1. Wilful Injury—Intoxication.—No compensation under this act shall be allowed for an injury caused:

(a) By the employe's wilful intention to injure himself or to [fol. 96] willfully injure another; nor shall compensation be paid to an injured employe if injury is sustained where intoxication of the employe was the proximate cause of the injury.

Sec. 2477-m2. Rights of Employe—Notice to Reject.—(a) Exclusive of Other Rights—Presumption—Notice.—The rights and remedies provided in this act for an employe on account of injury shall be exclusive of all other rights and remedies of such employe, his personal or legal representatives, dependents or next of kin, at common law or otherwise, on account of such injury; and all employes affected by this act shall be conclusively presumed to have elected to take compensation in accordance with the terms, conditions and provisions of this act until notice in writing shall have been served upon his employer, and also on the Iowa industrial commissioner, with return thereon by affidavit showing the date upon which notice was served upon the employer.

(b) Rejection—Procedure—Oath—Form—Undue Influence.—In the event such employe elects to reject the terms, conditions and

provisions of this act, the rights and remedies thereof shall not apply where an employe brings an action or takes proceedings to recover damages or compensation for injuries received growing out of and in the course of his employment, except as otherwise provided by this act; and in such actions where the employe has rejected the terms of this act the employer shall have the right to plead and rely upon any and all defenses, including those at common law, and the rules and defenses of contributory negligence, assumption of risk and fellow-servant shall apply and be available to the employer as by [fol. 97] statute authorized unless otherwise provided in this act. Provided, however, that if an employe sustains an injury as the result of the employer's failure to furnish or failure to exercise reasonable care to keep or maintain any safety device required by statute or rule, or violation of any of the statutory provisions or rules and regulations now or hereafter in force relating to safety of employes, the doctrine of assumed risk in such case growing out of the negligence of the employer shall not apply or be available as defensive matter to such offending party. The notice required to be given by an employe shall be substantially in the following form:

#### Employes' Notice to Reject

To ——— (name of employer) and the Iowa Industrial Commissioner:

You, and each of you, are hereby notified that the undersigned hereby elected to reject the terms, conditions and provisions of an act for the payment of compensation as provided by (chapter one hundred forty-seven of) the acts of the (thirty-fifth) general assembly and acts amendatory thereto, and elects to rely upon the common law as modified by section three of (chapter one hundred forty-seven of) the acts of the — (thirty-fifth) general assembly for the right to recover for personal injury which I may receive, if any, growing out of and arising from the employment while in line of duty for my employer above named.

[fol. 98] Dated this — day of —, 19—.

(Signed) ———.

STATE OF IOWA,

—— County, ss:

The undersigned being first duly sworn deposes and says that the written notice was on the — day of —, 19—, served on the within named employer of the undersigned by delivering to ——— a true, correct and verbatim copy thereof.

—— (Name of Person Served).

Subscribed and sworn (or affirmed) to before me by the said ——— this — day of —, 19—. ———, Notary Public.

In any case where an employe or one who is an applicant for employment elects to reject the terms, conditions and provisions of

this act, he shall, in addition to the notice required by subdivision (b) of section three of this act, state in an affidavit to be filed with said notice who, if any person, requested, suggested, or demands of such person to exercise the right to reject the provisions of this act. And if request, suggestion, or demand has been made of such employe by any person, such employe shall give and state the name of the person who made the request, suggestion, or demand, and all of the circumstances relating thereto, the date and place when and where made, and persons present, and if it be found that the employer of such employe, or an employer to whom an applicant for employment, or any persons a member of the firm, association, corporation, or agent or official of such employer, made a request, [fol. 99] suggestion or demand of such employe or applicant for employment to reject the terms, conditions and provisions of this act, such request, suggestion or demand if made under such conditions, shall be conclusively presumed to have been sufficient to have unduly influenced such employe or an applicant for employment to exercise the right to reject the terms of this act, and the rejection made under such circumstances shall be conclusively presumed to have been procured through fraud and thereby fraudulently procured, and such rejection shall be null and void and of no effect.

No persons interested in the business of such employer, financially or otherwise, shall be permitted to administer the oath to the affidavit required in case an employe or applicant for employment elects to exercise the right to reject the provisions of this act. And the person administering such oath in making such affidavit shall carefully read the notice and affidavit to such person making such rejection, and shall explain that the purpose of the notice is to bar such person from recovering compensation in accordance with the schedule and terms of this act in the event that he sustains an injury in the course of such employment; all of which shall be shown by certificate of the person administering the oath herein contemplated. The Iowa industrial commissioner, or any person acting for such commissioner, shall refuse to file the notice and affidavit, unless such notice, affidavit and certificate fully, and in detail, comply with the requirements hereof. And if such rejection, affidavit and certificate is found insufficient for any cause, (it) [fol. 100] shall be returned by mail or otherwise to the person who executed the instrument.

Sec. 2477-m3. Tenure of election.—(a) Until Provisions Complied with.—When the employer or employe has given notice in compliance with this act electing to reject the terms thereof such election shall continue and be in force until such employer or employe shall thereafter elect to come under the provisions of this act as is provided in subdivision (b) of this section.

(b) Notice—How Filed.—When an employer or employe rejects the terms, conditions or provisions of this act, such party may at any time thereafter elect to waive the same by giving notice in writing in the same manner required of the party in electing to reject

the provisions of the act and which shall become effective when filed with the Iowa industrial commissioner.

Sec. 2477-m4. Liability of Employer After Election to Reject.—Where the employer and employe elect to reject the terms, conditions and provisions of this act, the liability of the employer shall be the same as though the employe had not rejected the terms, conditions and provisions thereof.

Sec. 2477-m5. Subsequent Election to Reject—Security for Compensation.—An employer having come under this act, who thereafter elects to reject the terms, conditions and provisions thereof, shall not be relieved from the payment of compensation to such employe who sustains an injury in the course of the employment before the election to reject becomes effective; and in such cases the employer shall be required to secure the payment of any compensation due or that may become due to such workman, subject [fol. 101] to the approval of the Iowa industrial commissioner.

Sec. 2477-m6. Liability of Other Than That of Employer. Where an employe coming under the provisions of this act receives an injury for which compensation is payable under this act and which injury was caused under circumstances creating a legal liability in some person other than the employer, to pay damages in respect thereof:

(a) Proceedings Against Both Parties.—The employe or beneficiary may take proceedings both against that person to recover damages and against the employer for compensation, but the amount of the compensation to which he is entitled under this act shall be reduced by the amount of damages recovered.

(b) Indemnity—Subrogation.—If the employe or beneficiary in such case recovers compensation under this act, the employer by whom the compensation was paid or the party who has been called upon to pay the compensation, shall be entitled to indemnity from the person so liable to pay damages as aforesaid, and shall be subrogated to the rights of the employe to recover therefor.

Sec. 2477-m7. Contract to Relieve not Operative.—No contract, rule, regulation or device whatsoever shall operate to relieve the employer, in whole or in part from any liability created by this act except as herein provided.

Sec. 2477-m8. Notice of Injury—Form—Failure to Give.—Unless the employer or representative of such employer shall have actual knowledge of the occurrence of an injury, or unless the employe or someone on his behalf, or some of the dependents or someone [fol. 102] on their behalf, shall give notice thereof to the employer within fifteen days of the occurrence of the injury, then no compensation shall be paid until and from the date such notice is given or knowledge obtained; but if notice is given or the knowledge obtained within thirty days from the occurrence of the injury,



no want, failure or inaccuracy of a notice shall be a bar to obtaining compensation, unless the employer shall show that he was prejudiced by such want, defect or inaccuracy, and then only to the extent of such prejudice. Provided, that if the employe or beneficiary shall show that his failure to give prior notice was due to mistake, inadvertance, ignorance of fact, or law, or inability, or to the fraud, misrepresentation or deceit of another or to any other reasonable cause or excuse, then compensation may be allowed unless and then to the extent only that the employer shall show that he was prejudiced by failure to receive such notice. Provided, further, unless knowledge is obtained or notice given within ninety days after the occurrence of the injury, no compensation shall be allowed. No form of notice shall be required but may substantially conform to the following form:

#### Form of Notice

To ———— :

You are hereby notified that on or about the — day of —, 19—, personal injury was sustained by ———— while in your employ [fol. 103] at ——— (give name of place employed and point where located when injury occurred) and that compensation will be claimed therefor

(Signed) ————,

but no variation from this form of notice shall be material if the notice is sufficient to advise the employer that a certain employe, by name, received an injury in the course of his employment on or about a specified time at or near a certain place. Notice served upon one (upon) whom an original notice may be served in civil cases shall be a compliance with this act.

The notice required to be given to the employer may be served by any person over sixteen years of age, who shall make return upon a copy of the notice, properly sworn to, showing the date of service where and upon whom served, but no special form of the return of service of the notice shall be required. It shall be sufficient if the facts therefrom can be reasonably ascertained. The return of service may be amended at any time.

Sec. 2477-m9. Compensation Schedule.—If any employe has not given notice to reject the terms, conditions and provisions of this act, or has given such notice and waived the same as by this act provided, and the employer has not rejected the terms, conditions and provisions of the act or has given such notice and waived the same and the employer receives a personal injury arising out of and in the course of the employment, compensation shall be paid as herein provided.

(a) The compensation provided for in this act shall be paid in [fol. 104] accordance with the schedule unless otherwise provided.

(b) At the time of the injury and thereafter during the disability, but not exceeding four weeks of incapacity, the employer, if so requested by the employe, or any one for him, or if so ordered by the court or Iowa Industrial Commissioner shall furnish reasonable surgical, medical and hospital services, and supplies therefor, not exceeding one hundred (\$100.00) dollars. Provided, however, that in exceptional cases, an application may be made in writing to the Iowa Industrial Commissioner for additional surgical, medical and hospital services, and supplies therefor, in which case a copy of such application shall be mailed to the employer or his insurer. If such application is approved by the commissioner, then the employer shall furnish such additional services and supplies for such period, and in such amount as the Iowa Industrial Commissioner shall order, but in no event to exceed one hundred (\$100.00) dollars.

(c) Where the injury causes death the compensation under this act shall be as follows:

The employer shall in addition to any other compensation pay the reasonable expense of the employe's last sickness and burial not to exceed one hundred dollars. If the employe leaves no dependents this shall be the only compensation.

(d) If death results from the injury, the employer shall pay the dependents of the employe wholly dependent upon his earnings for support at the time of the injury, a weekly payment equal to sixty per cent of his average weekly wages, but not more than fifteen (\$15.00) dollars nor less than six (\$6.00) dollars per week for a [fol. 105] period of three hundred weeks.

(e) If the employe leaves dependents only partially dependent upon his earnings for support at the time of the injury, the weekly compensation to be paid as aforesaid shall be equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employe to such partial dependents bears to the annual earnings of the deceased at the time of the injury. When weekly payments have been made to an injured employe before his death, the compensation to dependents shall begin from the date of the last of such payments, but shall not continue more than three hundred weeks from the date of the injury.

(f) Where injury causes death to an employe, a minor, whose earnings were received by the parent, the compensation to be paid the parent shall be two-thirds of the amount provided for payment in subdivision (d) section ten (nine).

(g) No compensation shall be paid for an injury which does not incapacitate the employe for a period of at least two weeks from earning full wages; provided, however, that this provision shall not apply to those injuries resulting in disability partial in character and permanent in quality and compensated according to the schedule

found in section twenty-four hundred seventy-seven-m-9 (j) 2477-m-9-j), Supplement to the Code, 1913. Should such incapacity extend beyond a period of two weeks, compensation shall begin on the fifteenth day after the injury; provided, however, that if the [fol. 106] period of incapacity extends beyond the thirty-fifth day following the date of the injury, then the compensation for the fifth week of incapacity shall be increased by adding thereto an amount equal to two-thirds ( $\frac{2}{3}$ ) of the weekly compensation; if the period of incapacity extends beyond the forty-second (42) day following the date of the injury, then the compensation for the sixth week of incapacity shall be increased by adding thereto an amount equal to two-thirds ( $\frac{2}{3}$ ) of the weekly compensation; if the period of incapacity extends beyond the forty-ninth (49) day following the date of the injury, then the compensation for the seventh week of incapacity shall be increased by adding thereto an amount equal to two-thirds ( $\frac{2}{3}$ ) of the weekly compensation; if the period of incapacity extends beyond the forty-ninth (49) day following the date of the injury, then the compensation thereafter shall be only the weekly compensation provided for in this law.

(h) For injury producing temporary disability, sixty per cent of the average weekly wages received at the time of the injury, subject to a maximum compensation of fifteen dollars and a minimum of six dollars per week; provided, that if at the time of injury the employe receives wages less than six dollars per week, then he shall receive the full amount of wages per week. This compensation shall be paid during the period of such disability, not, however, beyond three hundred weeks.

(i) For disability total in character and permanent in quality, sixty per cent of the average weekly wages received at the time of the injury, subject to a maximum compensation of fifteen dollars [fol. 107] per week, and a minimum of six dollars per week, provided that if at the time of injury, the employe receives wages less than six dollars per week, then he shall receive the full amount of wages per week. This compensation shall be paid during the period of such disability, not, however, beyond four hundred weeks.

(j) For disability partial in character and permanent in quality, the compensation shall be as follows:

For all cases included in the following schedule, compensation shall be paid as follows, to-wit:

(1) For the loss of a thumb, Sixty per cent of daily wages during forty weeks.

(2) For the loss of a first finger, commonly called the index finger, sixty per cent of daily wages during thirty weeks.

(3) For the loss of a second finger, sixty per cent of daily wages during twenty-five weeks.

(4) For the loss of a third finger, sixty per cent of daily wages during twenty weeks.

(5) For the loss of a fourth finger, commonly called the little finger, sixty per cent of daily wages for fifteen weeks.

(6) For the loss of the first phalange of the thumb or of any finger shall be considered to be equal to the loss of one-half of such thumb or finger and compensation shall be one-half of the amounts above specified.

(7) The loss or more than one phalange shall be considered as the loss of the entire finger or thumbs; provided, however, that in no case shall the amount received for more than one finger exceeded [fol. 108] the amount provided in this schedule for the loss of a hand.

(8) For the loss of a great toe, sixty per cent of daily wages during twenty-five weeks.

(9) For the loss of one of the toes other than the great toe, sixty per cent of daily wages during fifteen weeks.

(10) For the loss of the first phalange of any toe, shall be considered to be equal to the loss of one-half of such toe and the compensation shall be one-half of the amount above specified.

(11) The loss of more than one phalange shall be considered as the loss of the entire toe.

(12) For the loss of a hand, sixty per cent of daily wages during one hundred fifty weeks.

(13) The loss of two-thirds of that part of an arm between the shoulder joint and the elbow joint shall constitute the loss of an arm, and the compensation therefore shall be sixty (60 per cent) of the average weekly wages during two hundred twenty-five (225) weeks.

(14) For the loss of a foot, sixty per cent of daily wages during one hundred twenty-five weeks.

(15) The loss of two-thirds of that part of a leg between the hip joint and the knee joint shall constitute the loss of a leg, and the compensation therefor shall be sixty (60 per cent) per cent of the average weekly wages during two hundred (200) weeks.

(16) For the loss of an eye, sixty per cent of daily wages during one hundred weeks.

(a) For the loss of a second or last eye, the other eye having been lost prior to the injury resulting in the loss of the second eye, [fol. 109] sixty (60 per cent) per cent of the average weekly wages during two hundred (200) weeks.

(17) For the loss of hearing in one ear, sixty (60) per cent of daily wages during fifty (50) weeks, and for the loss of hearing

in both ears, sixty (60) per cent of the daily wages during one hundred fifty (150) weeks.

(18) The loss of both arms, or both hands, or both feet, or both legs, or both eyes, or of any two thereof caused by a single accident, shall constitute total and permanent disability, to be compensated according to the provisions of section twenty-four hundred seventy-seven m-9 (i) (2477-m-9-i), supplement of the code, 1913.

(19) In all other cases in this, clause (j), the compensation shall bear such relation to the amount stated in the above schedule as the disability bears to those produced by the injuries named in the schedule. Should the employe and employer be unable to agree upon the amount of compensation to be paid in cases not specifically covered by the schedule, the amount of compensation shall be settled according to provisions of this act as in other cases of disagreement.

(20) The amounts specified in this, clause (j) and subdivisions thereof, shall be subject to the same limitations as to maximum and minimum weekly payments as are stated in clause (h), section ten (nine) hereof.

Sec. 2477-m10. Death—Payment of Unpaid Balance.—Where an employe is entitled to compensation under this act for an injury received and death ensues from any cause not resulting from the injury for which he was entitled to the compensation, payments of [fol. 110] the unpaid balance for such injury shall cease and all liability therefor shall terminate.

Sec. 2477-m11. Examination of Injured Employe—Suspension of Compensation.—After an injury, the employe, if so requested by his employer, shall submit himself for examination at some reasonable time and place within the state and as often as may be reasonably requested, to a physician or physicians authorized to practice under the laws of this state, without cost to the employe; but if the employe request, he shall, at his own cost, be entitled to have a physician or physicians of his own selection present to participate in such examination. The refusal of the employe to submit to such examination shall deprive him of the right to compensation during the continuance of such refusal. When a right to compensation is thus suspended no compensation shall be payable in respect to the period of suspension.

Sec. 2477-m12. Contributions from Employes—No Reduction of Employer's Responsibility.—The compensation herein provided shall be the measure of the responsibility which the employer has assumed for injuries or death that may occur to employes in his employment subject to the provisions of this act, and it shall not be in any wise reduced by contribution from employes.

Sec. 2477-m13. Trustees for Minors and Those Mentally Incapacitated—Reports.—When an injured minor, employe or a minor dependent or one physically or mentally incapacitated from earning

is entitled to compensation under this act, payment shall be made to a trustee appointed by the judge of the district court for each county in the respective judicial districts, and the money coming into [fol. 111] the hands of the said trustees shall be expended for the use and benefit of the person entitled thereto under the direction and orders of the judge during term time or in vacation. The trustee shall make annual reports to the court of all money or property received and expended for each person, and for services rendered as trustee shall be paid such compensation by the county as the court may direct by written order directed to the auditor of the county who shall issue a warrant therefor upon the treasurer of the county in which the appointment is made. If the judge making the appointment deems it advisable, a trustee may be appointed to serve for more than one county in the district and the expenses shall be paid ratably by each county according to the amount of work performed in each county. The trustee shall qualify and give bond in such amount as the judge may direct, which may be increased or diminished from time to time as the court may deem best. In case a deceased employe for whose injury or death compensation is payable leaves surviving him an alien dependent or dependents residing outside the United States, the consul-general, consul, vice-consul or consular agent of the nation of which the said dependent or dependents are citizens shall be regarded as the exclusive representative of such dependent or dependents. Such consular officer, or his duly appointed representative residing in the State of Iowa, shall have the exclusive right in behalf of such non-resident dependent or dependents to present, prosecute, litigate, adjust and settle all claims for compensation provided by this act and to receive for distribution [fol. 112] to such dependent or dependents all compensation arising thereunder.

Such consular officer or his duly appointed representative shall file with the industrial commissioner a copy of his exequatur or evidence of his authority and the industrial commissioner shall notify such consular officer or his said representative of the death of all employes leaving alien dependent or dependents residing in the country of said consular officer so far as the same shall come to his knowledge, provided, however, that nothing herein shall abridge the right of any relative of such decedent who may reside in the State of Iowa to take out administration upon the estate of such decedent, and as such receive the funds due said estate; and provided further that before said consular agent or his representative shall have the right to receive funds due the estate of said decedent he shall regularly take out administration in the county where decedent last resided, and give bond as administrator for the protection of such funds as provided by law.

Sec. 2477-m14. Commutation of Future Payments—Discretion of Court.—In any case where the period of compensation can be determined definitely either party may, upon due notice to the other, apply to any judge of the district court for the county in which

the accident occurred for an order commuting further payments to a lump sum; provided, however, that no judge of the district court shall consider any such application until there is endorsed thereon by the Iowa Industrial Commission his approval of such commutation, and no order shall be issued by such judge contrary to the endorsement of said Industrial Commissioner. And such judge may [fol. 113] make such an order when it shall be shown to his satisfaction that the payment of a lump sum in lieu of future monthly or weekly payments, as the case may be, will be for the best interest of the person or persons receiving or dependent upon said compensation, or that the continuance of periodical payments will, as compared with lump sum payments, entail undue expense or undue hardship upon the employer liable therefor. Where the commutation is ordered, the court shall fix the lump sum to be paid at an amount which will equal the total sum of the probable future payments capitalized at their present value and upon the basis of interest, calculated at five per cent per annum. Upon the payment of such amount the employer shall be discharged from all further liability on account of such injury or death, for which said compensation was being paid, and be entitled to a duly executed release, upon filing which the liability of such employer under any agreement, award, finding or judgment shall be discharged of record.

Sec. 2477-m15. Schedule of Computation.—The basis for computing compensation provided for in this act shall be as follows:

(a) The compensation shall be computed on the basis of the annual earnings which the injured person received as salary, wages or earnings in the employment of the same employer during the year next preceding the injury.

(b) Employment by the same employer shall be taken to mean employment by the same employer in the grade in which the employee was employed at the time of the accident, uninterrupted by [fol. 114] absence from work due to illness or any other unavoidable cause.

(c) The annual earnings, if not otherwise determinable, shall be regarded as three hundred times the average daily earnings in such computation.

(d) If the injured person has not been engaged in the employment for a full year immediately preceding the accident, the compensation shall be computed according to the annual earnings which persons of the same class in the same or in neighboring employments of the same kind have earned during such period. And if this basis of computation is impossible, or should appear to be unreasonable, three hundred times the amount which the injured person earned on an average of those days when he was working during the year next preceding the accident, shall be used as a basis for the computation.

(e) In case of injured employes who earn either no wages or less than three hundred times the usual daily wage or earnings of



the adult day laborer in the same line of industry of that locality, the yearly wage shall be reckoned as three hundred times the average daily local wages of the average wage earner in that particular kind or class of work; or if information of that class is not obtainable, then of the class or kindred or similarity in the same general employment in the same neighborhood.

(f) As to employees employed in a business or enterprise which customarily shuts down and ceases operation during a season of each year, the number of working days which it is the custom of such [fol. 115] business or enterprise to operate each year shall be used instead of three hundred as a basis for computing the annual earnings, provided the minimum number of days which shall be used as a basis for the year's work shall not be less than two hundred.

(g) Earnings, for the purpose of this action, shall be based on the earnings for the number of hours commonly regarded as a day's work for that employment, and shall exclude overtime earnings. The earnings shall not include any sum which the employer has been accustomed to pay the employe to cover any special expense entailed on him by the nature of the employment.

(h) In computing the compensation to be paid to any employe who, before the accident for which he claims compensation, was disabled and drawing compensation under the terms of this act, the compensation for each subsequent injury shall be apportioned according to the proportion of incapacity caused by the respective injuries which he may have suffered.

Sec. 2477-m 16. Terms Defined.—In this act unless the context otherwise requires:

(a) "Employer" includes and applies to any person, firm, association or corporation, and includes state, counties municipal corporations, cities under special charter and under commission form of government and shall include school districts and the legal representatives of a deceased employer. Whenever necessary to give effect to section seven of this act it includes a principal or intermediate contractor.

(b) "Workman" is used synonymously with "employe," and means any person who has entered into the employment of, or works [fol. 116] under contract of service, express or implied, or apprenticeship for an employer, except a person whose employment is purely casual or not for the purpose of the employer's trade or business or those engaged in clerical work only, but clerical work shall not include one who may be subjected to the hazards of the business, or one holding an official position or standing in a representative capacity of the employer, or an official elected or appointed by the state, county, school district, municipal corporation, cities under special charter and commission form of government; provided that one who sustains the relation of contractor with any person, firm, association, corporation or the state, county, school district, municipal



corporation, cities under special charter or commission form of government, shall not be considered an employe thereof.

The term "workman" shall include the singular and plural of both sexes. Any reference to a workman who has been injured shall, where the workman is dead, include a reference to his dependants as herein defined, legal representatives or where the workman is a minor or incompetent to his guardian or next friend.

(c) The following shall be conclusively presumed to be wholly dependent upon a deceased employe:

(1) The surviving spouse, unless it be shown that the survivor wilfully deserted deceased without fault upon the part of the deceased; and if it be shown that the survivor deserted deceased without fault upon the part of deceased, the survivor shall not be regarded as a dependent in any degree. No surviving spouse shall [fol. 117] be entitled to the benefits of this act unless she shall have been married to the deceased at the time of the injury, and should the deceased employe leave no dependent children, and should the surviving spouse remarry, then all compensation payable to her shall terminate on the date of such remarriage.

(2) A child or children under sixteen years of age (and over said age if physically or mentally incapacitated from earning) whether actually dependent for support or not upon the parent at the time of his or her death.

(3) A parent of a minor entitled to the earnings of the employe at the time when the injury occurred, subject to provisions of subdivision (f), section ten (nine) hereof.

(4) If the deceased employe leaves dependent surviving spouse, the full compensation shall be paid to such spouse; but if the dependent surviving spouse dies before payment is made in full, the balance remaining shall be paid to the person or persons wholly dependent, if any, share and share alike. If there be no person or persons wholly dependent, then payment shall be made to partial dependents.

(5) In all other cases, questions of dependency in whole or in part shall be determined in accordance with the fact as the fact may be at time of the injury; and in such other cases if there is more than one person wholly dependent, the death benefit shall be equally divided among them, and persons partially dependent, if any, shall receive no part thereof. If there is no one wholly dependent and more than one person partially dependent the death benefit shall be divided among them according to the relative extent of their [fol. 118] dependency. Provided, however, that when a lump sum is paid as contemplated by this act, the court or commissioner, in making distribution thereof, shall take into consideration the contingent rights of partial beneficiaries or the rights of those who may become such after a wholly dependent child or children become sixteen years of age.

(6) Step-parents shall be regarded in this act as parents.

(7) Adopted child or children or step-child or children shall be regarded in this act the same as if issue of the body.

(d) "Injury" or "personal injury" includes death resulting from injury.

(e) The words "personal injury arising out of and in the course of such employment" shall include injuries to employes whose services are being performed on, in or about the premises which are occupied, used or controlled by the employer, and also injuries to those who are engaged elsewhere in places where their employer's business requires their presence and subjects them to dangers incident to the business.

(f) The words "injury" and "personal injury" shall not include injury caused by the wilful act of a third person directed against an employe for reasons personal to such employe or because of his employment.

(g) They shall not include a disease except as it shall result from the injury.

(h) The word "court" whenever used in this act unless the context shows otherwise, shall be taken to mean the district court.

Sec. 2477-m17. Insurance Against Compensation Prohibited—[fol. 119] Penalty.—(a)—Any contract of employment, relief benefit or insurance or other device whereby the employe is required to pay any premiums for insurance against the compensation provided for in this act shall be null and void; and any employer withholding from the wages of any employe any amount for the purpose of paying any such premium shall be guilty of a misdemeanor and punishable by a fine not less than ten dollars nor more than fifty dollars for each offense, in the discretion of the court.

No employe or beneficiary shall have power to waive any of the provisions of this act in regard to the amount of compensation which may be payable to such employe or beneficiary hereunder to whom the act applies.

Sec. 2477-m18. Contract Respecting Claim for Injury Deemed Fraudulent.—Any contract or agreement made by any employer or his agent or attorney with any employe or any other beneficiary of any claim under the provisions of this act within twelve days after the injury shall be presumed to be fraudulent.

Sec. 2477-m20. Attorney's Lien—Subject to Approval.—No claim of an attorney at law for services in securing a recovery under this act shall be an enforceable lien thereon unless the amount of the same be approved in writing by a judge of a court of record or the Iowa Industrial Commissioner, which approval may be made in term time or vacation.

Sec. 2477-m21. Applicable to Intrastate and Interstate Commerce.—The provisions of this act shall apply to employers and em-

ployes as defined in this act engaged in intra-state commerce and [fol. 120] also those engaged in inter-state or foreign commerce for whom a rule or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intra-state work or foreign commerce shall be clearly separable and distinguishable from inter-state or foreign commerce; provided, that any such employer and workman of such employer working only in this state may, subject to the approval of the Iowa Industrial Commissioner, and so far as not forbidden by any act of congress or permitted, voluntarily by written agreement, accept and become bound by the provisions of this act in like manner and with the same force and effect in every respect as by this act provided for other employers and employes.

## Part II

Sec. 2477-m22. Iowa Industrial Commissioner—Appointment—Term.—There is hereby created the office of Iowa industrial commissioner, to be appointed by the governor, by and with the consent of the senate. The term of office of the commissioner shall be six years. An appointment may be made to fill a vacancy or otherwise when the senate is not in session, but shall be acted upon at the next session thereof.

The Iowa industrial commissioner shall appoint a deputy, for whose acts he shall be held responsible, who shall hold office during the pleasure of said industrial commissioner. Such appointment shall be made in writing, and must be approved by the executive [fol. 121] council of the State of Iowa. The deputy, in the absence or disability of the Iowa industrial commissioner, shall have all the powers and perform all of the duties of the industrial commissioner pertaining to his office, and shall receive an annual salary of twenty-four hundred dollars, payable in equal monthly installments, out of the state treasury and in same manner as are the salaries of other state officials.

Sec. 2477-m23. Salary — Expenses — Office—Seal—Assistants—Accounts—Political Activity—Annual Appropriation. The salary and actual necessary expenses of the commissioner shall be paid by the state, and he shall be provided with adequate and necessary office rooms, furniture, equipment, supplies and other necessities in the transaction of the business. The annual salary of the commissioner shall be thirty-three hundred dollars. The commissioner, by and with the consent of the executive council, may fix the salary and appoint a secretary and other assistants and clerical help as may be required and needed, provided, that the salary of the secretary shall not exceed eighteen hundred dollars per annum. The salary and actual personal expense account of the commissioner shall be itemized and sworn to and filed as other current bills as provided by statute, and warrant therefor shall be issued by the auditor upon the treasurer of the state for the payment thereof at the end of each calendar month; provided, however, that the expense account may

be audited, allowed and paid at the end of each week. The commissioner shall provide himself with a seal, which shall be used to [fol. 122] authenticate his orders, decisions and other proceedings deemed necessary, upon which shall be inscribed the words "Iowa Industrial Commissioner's Seal" and the date of organization. All other accounts made by, through or under the commissioner for salaries (and) expenditures, unless otherwise by this act provided, shall be itemized and sworn to by the parties entitled thereto, audited by the commissioner, attested by the secretary, filed as other bills are required by statute, and a warrant shall issue therefor by the auditor of state upon the treasurer, who shall pay the same out of the funds appropriated for the use of the commissioner as by this act provided. The salaries of all persons under the commissioner shall be audited, allowed and paid at the end of each month, and expense accounts may be audited, allowed and paid at the end of each week. The commissioner shall have the power to remove the secretary or any other person appointed to an office by him at any time the commissioner may see fit.

It shall be unlawful for any appointee by the commissioner to expouse the election or appointment of any candidate for or to any political office, or contribute to the campaign fund of any political party, or to the campaign fund of any person who is a candidate for election or appointment to any political office, and any person performing the duties as an appointee under the commissioner violating the provisions of this act shall be sufficient cause for dismissal and removal from office.

Before entering upon his duties the commissioner shall qualify by taking the oath of his office, that he will support the constitution [fol. 123] of the United States and of the state of Iowa, and will faithfully and impartially, without fraud, fear or favor, discharge the duties of his office incumbent upon him, as provided by the law of the state of Iowa, to the best of his ability and understanding.

There is hereby appropriated out of any money not otherwise appropriated for the use of the commissioner, as contemplated within the terms of this act or acts amendatory thereof, or other statutes relating to the commissioner, his duties and responsibilities empowered by law, the sum of twenty-thousand dollars annually, and in addition thereto the executive council shall provide and furnish the commissioner with such printing as may be necessary in the transaction of the business within the contemplation of the law.

Sec. 2477-m24. Powers—Rules—Witnesses—Reports.—The commissioner may make rules and regulations not inconsistent with this act for carrying out the provisions of the act. The employer shall furnish upon request of an injured employe or dependent or any legal representative acting for such person, a statement of the earnings, wages, or salary and other matters relating to such earnings, wages, or salary during the year or part of the year that such employe was in the employment of such employer for the year preceding the injury. Provided, however, that not more than one report shall be required for each on account of any one injury. Process and pro-

cedure under this act shall be as summary as reasonably may be. While sitting as an arbitration committee, or when conducting a hearing upon review, or in the making of any investigation or in-[fol. 124] quiry, neither the commissioner nor the arbitration committee shall be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, but may hold such arbitrations or conduct such hearings and make such investigations and inquires in the manner best suited to ascertain the substantial rights of the parties. The commissioner shall have the power to subpoena witnesses, administer oaths and to examine such books and records of the parties to a proceeding or investigation as relate to questions in dispute or under investigation. The fees for attending as a witness before the industrial commissioner shall be one dollar and fifty cents per diem; for attending before an arbitration committee, one dollar per diem; in both cases five cents per mile for traveling to and from the place of hearing. The district court is hereby empowered to enforce by proper proceedings the provisions of this section relating to the attendance and testimony of witnesses and the examination of books and records. The deposition of any witnesses may be taken and used as evidence in any hearing pending before a board of arbitration in workmen's compensation proceeding in connection herewith. That such deposition shall be taken in the same manner as provided for the taking of depositions in the district court, and when so taken shall be admissible in evidence in such hearings in the same manner subject to the same rules governing the admission of evidence in the district court. Application for permission to take depositions in such case shall be filed in the district court of the county wherein the case for arbitration shall be [fol. 125] heard. The commissioner shall make biennial reports to the governor who shall transmit the same to the general assembly, in which, among other things, the commissioner shall recommend such changes in the law covered by this act as he may deem necessary.

Sec. 2477-m25. Compensation Agreements—Approval.—If the employer and the employe reach an agreement in regard to the compensation under this act, a memorandum thereof shall be filed with the Iowa industrial commissioner by the employer or employe, and unless the commissioner shall, within twenty days, notify the employer and employe of his disapproval of the agreement by registered letter sent to their addresses as given on the memorandum filed, the agreement shall stand as approved and be enforceable for all purposes under the provisions of this act. In case the injured employe is a minor, either he or the trustee provided for in section, twenty-four hundred seventy-seven-m-13 (2477-m-13), supplement to the code, 1913, may execute the memorandum of agreement provided for herein, and may give a valid and binding release for the compensation paid on his account under the terms of this act. Such agreement shall be approved by said commissioner only when the terms conform to the provisions of this act.

Sec. 2477-m26. Committee of Arbitration.—If the employer and the injured employe or representatives or dependents fail to reach

an agreement in regard to compensation under this act, either party may notify the industrial commissioner, who shall thereupon call for the formation of a committee of arbitration. The arbitration [fol. 126] committee shall consist of three persons, one of whom shall be the industrial commissioner who shall act as chairman. The other two shall be named, respectively, by the two parties. If a vacancy occurs it shall be filled by the party whose representative is unable to act.

Sec. 2477-m27. Oath of Arbitrators.—The arbitrators appointed by the parties shall be sworn by the chairman to take the following oath:

I, ———, do solemnly swear (or affirm) that I will faithfully perform my duties as arbitrator and will not be influenced in my decision by any feeling of friendship or partiality toward either party.  
(Signed) ———.

Sec. 2477-m28. Appointment of Arbitrators.—It shall be the duty of the industrial commissioner, upon notification that the parties have failed to reach an agreement, to request both parties to appoint their respective representatives on the committee of arbitration. The commissioner shall act as chairman, and, if either party does not appoint its member on this committee within seven days after notification as above provided, or after a vacancy has occurred, the commissioner shall fill the vacancy and notify the parties to that effect.

Sec. 2477-m29. Powers of Committee—Hearings—Decisions.—The committee of arbitration shall make such inquiries and investigations as it shall deem necessary. The hearings of the committee shall be in the city, town or place where the injury occurred, if within the state. If the injury occurred outside this state the hearings of the committee shall be held in the county seat of this state [fol. 127] which is nearest to the place where the injury occurred unless the interested parties and the Iowa Industrial Commissioner mutually agree by written stipulation that the same may be held at some other place. The decision of the committee, together with the statement of evidence submitted before it, its findings of fact, rulings of law and any other matters pertinent to questions arising before it shall be filed with the Industrial Commissioner. Unless a claim for review is filed by either party within five days from the date of filing the decision with said Commissioner, such decision shall be enforceable under the provisions of this chapter.

Sec. 2477-m30. Examination by Physician—Fee—Evidence.—The industrial commissioner may appoint a duly qualified impartial physician to examine the injured employe and make report. The fee for this service shall be five dollars, to be paid by the industrial commissioner, together with traveling expenses, but the commissioner may allow additional reasonable amounts in extraordinary cases. Any physician so examining any injured employe shall not be prohibited from testifying before the Iowa industrial commissioner or any other person, commission or court, as to the results of his examination or the condition of the injured employe.



Sec. 2477-m31. Compensation of Arbitrators—Costs.—The arbitrators named by or for the parties to the dispute shall each receive five dollars as a fee for his services, but the industrial commissioner may allow additional reasonable amounts in extraordinary cases. The fees shall be paid by the employer who may deduct an amount equal [fol. 128] to one-half of the sum from any compensation found due the employee. And all other costs incurred in the hearing before the board of arbitration shall be taxed to the losing party, or an equitable apportionment made thereof by the committee according to the facts.

Sec. 2477-m32. Review—Second Hearing.—If a claim for review is filed, the industrial commissioner shall hear the parties and may hear evidence in regard to any or all matters pertinent thereto and may revise the decision of the committee in whole or in part, or may refer the matter back to the committee for further findings of fact, and shall file its decision with the records of the proceedings and notify the parties thereof. No party shall as a matter of right be entitled to a second hearing upon any question of fact.

Sec. 2477-m33. Any party in interest may present a certified copy of an order or decision of the commissioner, or an award of an arbitration committee from which no claim for review has been filed within the time allowed therefor, or a memorandum of agreement approved by the commissioner, and all papers in connection therewith, to the district court of the county in which the injury occurred, whereupon said court shall render a decree in accordance therewith and notify the parties. Such decree, in the absence of an appeal from the decision of the industrial commissioner, shall have the same effect and in all proceedings in relation thereto shall thereafter be the same as though rendered in a suit duly heard and determined by said court. Upon the presentation to the court of a certified copy of a decision of the industrial commissioner, ending [fol. 129] diminishing or increasing a weekly payment under the provisions of this act, the court shall revoke or modify the decree to conform to such decision.

No order or award of an arbitration committee is appealable direct to the courts, but if any party in interest is aggrieved thereby, he may within five (5) days from the date thereof apply to the industrial commissioner for a review of the same by such industrial commissioner in the manner as hereinbefore provided. If any such party is aggrieved by reason of an order or decree of the Iowa industrial commissioner, such party may appeal therefrom to the district court of Iowa, only in the manner and upon the grounds following:

Within thirty (30) days from the date of such order or decree of the industrial commissioner, the party aggrieved may file an application in writing with the Iowa industrial commissioner asking for an appeal from such order or decree, stating generally the grounds upon which such appeal is sought. In the event such application is filed as hereinbefore provided, the industrial commissioner shall, within thirty days from the filing of same, cause certified copies of all documents and papers then on file in his office

in the matter, and a transcript of all testimony taken therein, to be transmitted with his findings and order or decree to the clerk of the district court of Iowa in and for that county wherein the injury occurred. The application for such appeal may thereupon be brought on for hearing before said district court upon such record by either party on ten (10) days' written notice to the other; sub-[fol. 130] ject, however, to the provisions of law for a change of the place of trial or the calling of another judge. The findings of fact made by the industrial commissioner within his powers shall, in the absence of fraud, be conclusive, but upon such hearing the court may confirm or set aside such order or decree of the industrial commissioner, if he finds:

(1) That the industrial commissioner acted without or in excess of his powers; or

(2) That the order or decree was procured by fraud; or

(3) That the facts found by the industrial commissioner do not support the order or decree.

(4) That there is not sufficient competent evidence in the record to warrant the industrial commissioner in making the order or decree complained of.

No order or decree of the industrial commissioner shall be set aside by the court upon other than the grounds just stated.

Upon the setting aside of any such order or decree, the court may recommit the controversy to the industrial commissioner for further hearing or proceedings, or it may enter the proper judgment upon the findings, as the nature of the case may demand. Such decree shall have the same effect and in all proceedings in relation thereto shall thereafter be the same as though rendered in a suit duly heard and determined by said court. An abstract of the judgment entered by the trial court upon the appeal from any order or decree shall be made by the clerk thereof upon the docket entry of any judgment which may hereinbefore have been rendered upon it. Such order or decree and transcript of such abstract may thereupon be [fol. 131] obtained for like entry upon the dockets of the courts of other counties within the state.

Any party in interest who is aggrieved by a judgment entered by the district court upon the appeal of an order or decree, may appeal therefrom within the time and in the manner provided for in appeal from the orders, judgments and decrees of the district court of Iowa; but all such appeals shall be placed on the calendar of the supreme court and brought to a hearing in the same manner as criminal causes on such calendar.

No fee shall be charged by the clerk of any district court for the performance of any official service required by this act, except for the docketing of judgments and for certified copies or transcripts thereof. In proceeding on appeal from an order or decree, costs as between the parties shall be allowed or not, in the discretion of the court.



Sec. 2477-m34. Review of Payment—Notice.—(a) Any payment required to be made under this act, which has not been commuted, may be reviewed by the industrial commissioner at the request of the employer or of the employe, and if on such review the commissioner finds the condition of the employe warrants such action, he may end, diminish or increase the compensation, subject to the maximum or minimum amounts provided for in this act. All hearings upon review of the Iowa industrial commissioner under the provisions of this section, or under section twenty-four hundred seventy-seven-m 32 (2477-m-32), supplement to the code, 1913, shall be held at Des Moines, Iowa, unless the interested parties and the Iowa industrial commissioner mutually agree by written stipulation that the same may be held at some other place.

[fol. 132] Upon the presentation to the court of a certified copy of a decision of the industrial commissioner ending, diminishing or increasing a weekly payment under the provisions of this act, the court shall revoke or modify any judgment or decree then on record in his court to conform to such decision.

(b) Any notice to be given by the commissioner or court provided for in this act shall be in writing but service thereof shall be sufficient if registered and deposited in the mail, addressed to the last known address of the parties.

Sec. 2477-m35. Fees Subject to Approval.—Fees of attorneys and physicians for services under this act shall be subject to the approval of the industrial commissioner unless otherwise provided in this act.

Sec. 2477-m36. Reports by Employers—Records—Inspection.—Every employer shall hereafter keep a record of all injuries, fatal or otherwise, sustained by his employes in the course of their employment and resulting in incapacity for a longer period than one day. Within forty-eight hours, not counting Sundays and legal holidays, after the employer has knowledge of the occurrence of an accident resulting in personal injury causing incapacity for a longer period than one day, a report shall be made in writing by the employer to the industrial commissioner on blanks to be procured from the commissioner for that purpose.

Upon the termination of the disability of the injured employe, or if such disability extends beyond a period of sixty days, at the expiration of such period, the employer shall make a supplemental [fol. 133] report on blanks to be procured from the commissioner for that purpose. The said reports shall contain the name and nature of the business of the employer, the location of the establishment, the name, age, sex and occupation of the injured employe, and shall state the date and hour of the accident, the nature and cause of the injury, and such other information as may be required by the commissioner. Any employer who refuses or neglects to make the report required by this section shall be punished by a fine of not more than fifty dollars for each offense.

All books, records and pay rolls of the employers, coming under this act showing or reflecting in any way upon the amount of wage

expenditure of such employer, shall always be open for inspection by the industrial commissioner, or any of his representatives presenting a certificate of authority from said commissioner for the purpose of ascertaining the correctness of the wage expenditure; the number of men employed and such other information as may be necessary for the uses and purposes of the commissioner in his administration of the law. But information obtained within the contemplation of this act shall be used for no other purpose than the information of the commissioner or insurance association with reference to the duties imposed upon such commissioner. A refusal on the part of the employer to submit his books, records or pay rolls for the inspection of the commissioner, or his authorized representatives presenting written authority from the commissioner, shall subject the employer to a penalty of one hundred dollars for each such offense, to be collected by civil action in the name of the state, and paid into the state treasury.

[fol. 134] Sec. 2477-m37. Political Activity and Contributions Prohibited—Penalty.—It shall be unlawful for the commissioner, during his term of office, to serve upon any committee of any political party or espouse the election or appointment of any person for any political office or contribute to any campaign fund of any political party, or to the campaign fund of any person who is a candidate for election or appointed to any political office. A violation of this section shall be deemed a misdemeanor and upon conviction shall be fined one hundred dollars.

Sec. 2477-m38. Candidate for Commissioner—Political Promises Prohibited—Penalty.—It shall be unlawful for any person who is a candidate for the appointment as commissioner to make any promise to another, expressed or implied, in consideration of any assistance or influence given or recommendation made that the candidate will, if appointed as commissioner, vote to appoint such person or one whom he may recommend to an office within the power of the commissioner to appoint. A violation thereof shall be deemed a misdemeanor and upon conviction thereof shall be fined one hundred dollars.

Sec. 2477-m39. Recommendations of Candidates to be in Writing—Record—Public Inspection—Financial Interest Prohibited—Penalty.—All recommendations made by any person to the commissioner asking the appointment of another as commissioner shall be reduced to writing signed by the person presenting the same, which shall be filed by the governor in his office and open at all reasonable times for public inspection, and all recommendations [fol. 135] made by any person to the commissioner for the appointment of another within the power of the commissioner to appoint, shall be reduced to writing, signed by the person presenting the same and filed by the commissioner and open for public inspection at all reasonable times and hours. If any person recommending the appointment of another within the contemplation of this act refuse to reduce the same to writing, it shall be the duty of the person to

whom the recommendation is made, to make a brief memorandum thereof, stating the name of the person recommended and the name of the person who made the same, which shall be filed as by this act in other cases provided. It shall be unlawful for the commissioner to be financially interested in any business enterprise coming under or affected by this act during his term of office, and if he offend this statute, it shall be sufficient grounds for his removal from office and in such case the governor shall at once declare the office vacant and appoint another to fill the vacancy.

Sec. 2477-m40. Removal from Office—Filing of Charges—Executive Council Shall Hear.—The governor shall remove from office the commissioner on the grounds of inefficiency, neglect of duty, or malfeasance in office, upon written charges having been filed with the executive council and sustained by proofs; but written notice of such charges, together with a copy thereof, shall be served upon the accused ten days before the time fixed for hearing. The executive council shall have jurisdiction to hear the case, and shall make such finding in accordance with justice and the law. The finding shall be reduced to writing, and report and finding filed with the governor.

[fol. 136]

### Part III

Sec. 2477-m41. Insurance of Liability.—Every employer, subject to the provisions of this act, shall insure his liability thereunder in some corporation, association or organization approved by the state department of insurance. Every such employer shall within thirty days after this act goes into effect exhibit on demand of the state insurance department evidence of his compliance with this section; and if such employer refuses or neglects to comply with this section, he shall be liable in case of injury to any workman in his employ under the common law as modified by statute, and in the same manner and to the same extent as though such employer had legally exercised his right to reject the compensations provisions of chapter eight-a (8-a), title XII, supplement to the code, 1913.

Any employer who fails to insure his liability as required herein shall post and keep posted a sign of sufficient size and so placed as to be easily seen by his employes in the immediate vicinity where working, which sign shall read as follows:

#### Notice to Employes

You are hereby notified that the undersigned employer has failed to insure his liability to pay compensation as required by law, and that because of such failure he is liable to his employes in damages for personal injuries sustained by his employes in the same manner and to the same extent as though he had legally exercised his right to reject the compensation provisions of chapter eight-a (8-a), title [fol. 137] XII, supplement to the code, 1913.

(Signed) ———.

Any employer coming under the provisions of this act who fails to comply with this section or to post and keep posted the above notice in the manner and form herein required shall be guilty of a misdemeanor.

Sec. 2477-m42. Mutual Companies—Conditions.—For the purpose of complying with the foregoing section, groups of employers by themselves or in an association with any or all of their workmen, may form insurance associations as hereafter provided, subject to such reasonable conditions and restrictions as may be fixed by the state insurance department and membership in such mutual insurance organization as approved, together with evidence of the payment of premiums due, shall be evidence of compliance with the preceding section.

Sec. 2477-m43. Benefit Insurance—Approval.—Subject to the approval of the Iowa Industrial Commissioner, any employer or group of employers may enter into or continue an agreement with his or their workmen to provide a scheme of compensation, benefit or insurance in lieu of the compensation and insurance provided by this act; but such scheme shall in no instance provide less than the benefits here secured, nor vary the period of compensation provided for disability or for death, or the provisions of this act with respect to periodic payments, or the percentage that such payments shall bear to weekly wages, except that the sums required may be increased; [fol. 138] provided, further that the approval of the Iowa Industrial Commissioner shall be granted, if the scheme provides for contribution by workmen, only when it confers benefits in addition to those required by this act commensurate with such contributions.

Sec. 2477-m44. Certificate of Approval.—Whenever such scheme or plan is approved by the Iowa Industrial Commissioner, he shall issue a certificate to that effect, whereupon it shall be legal for such employer, or group of employers, to contract with any or all of his or their workmen to substitute such scheme or plan for the provisions of this act during a period of time fixed by said department.

Sec. 2477-m45. Termination—Appeal to District Court.—Such scheme or plan may be terminated by the Iowa Industrial Commissioner on reasonable notice to the interested parties if it shall appear that the same is not fairly administered, or if its operation shall disclose latent defects threatening its solvency, or if for any substantial reason it fails to accomplish the purpose of this act, but from any such order of said Iowa Industrial Commissioner the parties affected, whether employer or workmen, may upon the giving of proper bond to protect the interests involved, appeal for equitable relief to the district court of this state.

Sec. 2477-m46. Maximum Commission or Compensation for Reinsurance.—No insurer of any obligation under this act shall either by himself or through another, either directly or indirectly, charge or accept as a commission or compensation for placing or renewing [fol. 139] any insurance under this act more than fifteen per cent of the premium charged.

Sec. 2477-m47. Policy Requirements.—Every policy issued by any insurance corporation, association or organization to assure the payment of compensation under this act shall contain a clause providing that between any employer and the insurer, notice to and knowledge of the occurrence of injury or death on the part of the insured shall be notice and knowledge on the part of the insurer; and jurisdiction of the insured for the purpose of this act shall be jurisdiction of the insurer and the insurer shall be bound by every agreement, adjudgment, award or judgment rendered against the insured.

Sec. 2477-m48. Insolvency Clause Prohibited—Lien of Insured.—No policy of insurance issued under this act shall contain any provision relieving the insurer from payment if the insured becomes insolvent or discharged in bankruptcy during the period that the policy is in operation, or the compensation, or any part of it, is due and unpaid. Every policy shall provide that the workman shall have a first lien upon any amount becoming due on account of such policy to the insured from the insurer, and that in case of the legal incapacity, inability or disability of the insured to receive the amount due and pay it over to the insured workman, or his dependents, said insurer shall pay the same directly to such workman, his agent, or to a trustee for him or his dependents, to the extent of discharging any obligation of the insured to said workman or his dependents.

[fol. 140] Sec. 2477-m49. Proof of Solvency—Revocation of Approval.—Where an employer coming under this act furnishes proof to the insurance department satisfactory to the insurance department and Iowa Industrial Commissioner, of such employer's solvency and financial ability to pay the compensation and benefits as by this act provided and to make such payments to the parties when entitled thereto, or when such employer deposits with such insurance department security satisfactory to such insurance department and the Iowa Industrial Commissioner as will secure the payment of such compensation such employer shall be relieved of the provisions of section forty-two of this act; provided that such employer shall from time to time, as may be required by such insurance department and Iowa Industrial Commissioner, furnish such additional proof of solvency and financial ability to pay as by this section of this act provided.

The insurance department and Iowa Industrial Commissioner may, at any time, upon reasonable notice to such employer and upon hearing, revoke for cause any order or approval theretofore made, as by this act provided and within the contemplation of this section.

[fol. 141]

## DEFENDANT'S EXHIBIT "D"

Schendel vs. C. P. &amp; R. I.

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

Mrs. C. Y. Hope, Claimant,

vs.

CHICAGO, ROCK ISLAND &amp; PACIFIC RAILWAY COMPANY, Defendant

## Certificate

To the District Court of Iowa in and for Lucas County:

I, A. B. Funk, Industrial Commissioner of Iowa, hereby certify, that Exhibit "A" is a true and correct copy of the Application of the Chicago, Rock Island and Pacific Railway Company for Arbitration in the above entitled case which was filed in my office on March 2nd, 1923.

That Exhibit "B" is a true and correct copy of the Answer filed by the respondent, Mrs. C. Y. Hope, in connection with the above entitled case in the office of the Iowa Industrial Commissioner on March 9th, 1923.

That Exhibit "C" is a true and correct copy of Applicant's Designation of an Arbitrator, which was filed with Deputy Industrial Commissioner Young in connection with the above entitled case at the time of the arbitration hearing on March 20th, 1923.

That Exhibit "D" is a true and correct copy of the Arbitration Committee's Findings for Defendant, which was filed in the office of the Iowa Industrial Commissioner in connection with the above entitled case on March 23rd, 1923.

That Exhibit "E" is a true and correct copy of a letter received from Davis & Michel, attorneys representing the respondent in the above entitled case and filed in the office of the Iowa Industrial Commissioner on March 27th, 1923 giving notice of appeal from the award of the arbitration committee.

That Exhibit "F" is a true and correct copy of the Decision in Review which was filed by the Iowa Industrial Commissioner in connection with the above entitled case on May 9th, 1923.

That Exhibit "G" is a true and correct copy of the Notice of Appeal which was filed by the appellant in the office of the Iowa Industrial Commissioner in connection with the above entitled case on May 17th, 1923.

That Exhibit "H" is the transcript of the evidence which was taken at the time of the arbitration hearing in connection with the above entitled case and filed in the office of the Iowa Industrial Commissioner, including Exhibits "1" to "7" inclusive which were introduced into the record.

That all of the foregoing mentioned exhibits are attached hereto,

forming a complete and correct copy of the record in the above en-[fol. 143] titled case as it now appears in the files of the Iowa Industrial Commissioner.

Signed this 19th day of May, 1923.

A. B. Funk, Iowa Industrial Commissioner.

EXHIBIT "A" TO DEFENDANT'S EXHIBIT "D"

State of Iowa Workmen's Compensation Service

Application of the Chicago, Rock Island & Pacific Railway Company for Arbitration in the Matter of C. Y. Hope, Deceased

To A. B. Funk, Industrial Commissioner of the State of Iowa:

You are hereby notified that on or about the 4th day of February, 1923, one C. Y. Hope, then an employe of the Chicago, Rock Island & Pacific Railway Company, received injuries while acting within the scope of his employment from which he shortly thereafter died. That by reason of the nature of the employment of said decedent, this applicant, The Chicago, Rock Island & Pacific Railway Company, his employer, has become liable as it verily believes, for the payment of compensation to the dependents of the said C. Y. Hope, deceased. That said decedent left surviving him a widow, Mrs. C. Y. Hope, who resides at Chariton, Iowa, and as this applicant is advised, two or more dependent step-children. That this applicant, the [fol. 144] employer of said decedent, has failed to reach an agreement in regard to compensation with the persons entitled thereto.

Wherefore, your applicant prays that the surviving spouse of said decedent, to-wit: Mrs. C. Y. Hope, be required to answer this application for arbitration. That a time and place be fixed for hearing thereon, and due notice thereof be given, and that upon such hearing an order or award be made such as is proper in the premises.

Dated this 2nd day of March, A. D. 1923, at Des Moines, Iowa.

The Chicago Rock Island & Pacific Railway Company, by J. G. Gamble, R. L. Read, Its Attorneys.

EXHIBIT "B" TO DEFENDANT'S EXHIBIT "D"

Workmen's Compensation Service

Application of the Chicago, Rock Island & Pacific Railway Company for Arbitration in the Matter of C. Y. Hope, Deceased

Answer to Petition for Arbitration

To the Iowa Industrial Commissioner:

The respondent above named for answer to plaintiff's petition respectfully states:



Now comes Mrs. C. Y. Hope and respectfully alleges and states:

[fol. 145]

I

That she is the surviving widow of the above named decedent, C. Y. Hope.

II

That her right and claim of action against the Chicago, Rock Island & Pacific Railway Company for damages growing out of the death of said C. Y. Hope while employed by said Chicago, Rock Island & Pacific Railway Company is wholly governed by the laws of the United States and especially the Federal Employers' Liability Law; and that at the time of the injuries resulting in his death of said C. Y. Hope was engaged as an employee of the Chicago, Rock Island & Pacific Railway company, was an interstate carrier engaged in interstate commerce, and said decedent was working and engaged in interstate commerce as such employee at said time. That because of said facts the Workmen's Compensation Act of Iowa has no application to and does not govern any rights of Mrs. C. Y. Hope.

Wherefore the respondent prays relief as follows:

That your commissioner adjudge that decedent and his employer were engaged in Interstate Commerce at the time of his injuries, and that therefore no relief granted herein.

Dated at —, Iowa, this 8th day of March, 1923.

(Signed) Mrs. C. Y. Hope, Respondent. Davis & Michel,  
419 Met. Bk. Bldg., Minneapolis, Minn.

[fol. 146] EXHIBIT "C" TO DEFENDANT'S EXHIBIT "D"

Iowa Workmen's Compensation Service

Before the Arbitration Committee Organized under the Provisions  
of the Iowa Workman's Compensation Law

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY,  
Applicant,

vs.

Mrs. JESSIE HOPE, Surviving Widow of C. Y. Hope, Deceased,  
Respondent

Applicant's Designation of an Arbitrator

Comes now the applicant and designates A. E. Hollingsworth as its arbitrator as a member of the Arbitration Committee provided for by the Iowa Workmen's Compensation Act.

The Chicago, Rock Island & Pacific Railway Company.  
(Signed) J. G. Gamble, J. A. Penick, A. B. Howland, Its  
Attorneys.



[fol. 147] EXHIBIT "D" TO DEFENDANT'S EXHIBIT D

Mrs. C. Y. HOPE, Claimant,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY CO., Defendant

Arbitration Committee Findings for Defendant

The undersigned, Ralph Young, A. E. Hollingsworth and I. L. Guernsey being the Committee of Arbitration duly constituted in the case of Mrs. C. Y. Hope vs. C. R. I. & P. R. R. Co., pursuant to the provisions of Chapter 147, Acts of the Thirty-fifth General Assembly of Iowa, being duly sworn and having held a session beginning on the 20th March, 1923 at Chariton, Iowa and having heard the testimony and arguments offered, do hereby adjudge and announce the following decision:

Findings

1. That on February 4th, 1923 C. Y. Hope was in the employ of the Chicago, Rock Island and Pacific Railway Co. as a freight conductor.

2. That on February 4th, 1923 while C. Y. Hope was engaged in taking his train from Pershing, Ia., to Chariton, Ia. which train at [fol. 148] the time consisted of engine and caboose only, such train was struck by a passenger train and in resulting wreck the said C. Y. Hope suffered fatal injuries.

3. That such fatal injuries suffered by the said C. Y. Hope arose out of and in the course of his employment by the Chicago, Rock Island and Pacific Railway Co.

4. That at the time of his fatal injuries the deceased was not engaged in interstate commerce.

5. That by reason of the findings set out in Paragraph 4, the case is governed by the provisions of the Iowa Workmen's Compensation Law.

6. That by reason of the findings set out in Paragraph 3, the widow of the deceased is entitled to recovery under the Iowa Workmen's Compensation Law.

7. Wherefore the Chicago, Rock Island and Pacific Railway Co. is hereby ordered to pay Mrs. C. Y. Hope compensation under the Iowa Workmen's Compensation Law at the rate of \$15.00 a week for 300 weeks, starting as of the date of death. The Chicago, Rock Island and Pacific Railway Co. is also ordered to pay the statutory medical, surgical and hospital and burial benefits and to pay the costs of this hearing.

Signed at Chariton, Ia., this 20th day of March, 1923.

(Signed) Ralph Young, A. E. Hollingsworth, I. L. Guernsey, Committee of Arbitration.

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[fol. 149] EXHIBIT "E" TO DEFENDANT'S EXHIBIT "D"

Copy

Law Offices of Davis & Michel, 419 Metropolitan Bank Bldg., Suite 419-423, Minneapolis, Minn.

March 26th, 1923.

Ralph Young, Deputy Industrial Commissioner, Des Moines, Iowa.

DEAR SIR:

Will you kindly have a copy of the evidence in the case of Hope Estate vs. C. R. L. & P. Ry. Co., sent to us, upon which the decision in this matter was based.

We wish to appeal from the award made by your board and will have proper papers filed with you.

Upon receipt of your bill, we will mail you check.

Very truly yours, (Signed) Davis & Michel.

eam-eh.

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[fol. 150] EXHIBIT "F" TO DEFENDANT'S EXHIBIT "D"

Before the Iowa Industrial Commissioner

Mrs. C. Y. HOPE, Claimant,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant

In Review

Arbitration in this case was instituted by The Chicago, Rock Island & Pacific Railway Company, for the purpose of determining whether or not the same is subject to adjustment under the Iowa Workmen's Compensation Statute.

Application for arbitration was filed with this department March 2, 1923.

A copy of this application was mailed to Mrs. C. Y. Hope at Chariton, March 2, 1923.

March 16, 1923, a letter was received at this department from Davis & Michel, of Minneapolis, Minnesota, attorneys for this claimant, acknowledging receipt of a copy of said application.

March 9, 1923, there was filed with the department by Davis & Michel, an answer to the petition for arbitration.

[fol. 151] Abitration proceedings was by the commissioner scheduled to occur at Chariton, March 20th, 1923 of which due notice was given to all concerned.

Hearing was held in accordance with this notice, Failing to appear and to appoint a member of the arbitration committee, the vacancy was filled by the deputy commissioner as provided by Section 2477-m23, Supplement to the Code of 1913. Whereupon the committee proceeded to arbitrate issues involved, as appears in the transcript of evidence included in this report.

The finding of the arbitration committee is as follows:

1. That on February 4th, 1923, C. Y. Hope was in the employ of the Chicago, Rock Island and Pacific Railway Company as a freight conductor.

2. That on February 4th, 1923, while C. Y. Hope was engaged in taking his train from Pershing, Iowa, to Chariton, Iowa, which train at the time consisted of engine and caboose only, such train was struck by a passenger train and in resulting wreck the said C. Y. Hope suffered fatal injuries.

3. That such fatal injuries suffered by the said C. Y. Hope arose out of and in the course of this employment by the Chicago, Rock Island and Pacific Railway Company.

4. That at the time of his fatal injuries the deceased was not engaged in interstate commerce.

5. That by reason of the findings set out in Paragraph 4, the case is governed by the provisions of the Iowa Workmen's Compensation Law.

[fol. 152] 6. That by reason of the findings set out in Paragraph 3, the widow of the deceased is entitled to recovery under the Iowa Workmen's Compensation Law.

7. Wherefore, The Chicago, Rock Island and Pacific Railway Company is hereby ordered to pay Mrs. C. Y. Hope compensation under the Iowa Workmen's Compensation Law at the rate of \$15.00 per week for 300 weeks, starting as of the date of death. The Chicago, Rock Island and Pacific Railway Company is also ordered to pay the statutory, medical, surgical and hospital and burial benefits and to pay the costs of this hearing.

Following is a copy of a communication received from Davis & Michel, Attorneys for Mrs. C. Y. Hope, dated March 26, 1923:

Minneapolis, Minn.

Mr. Ralph Young, Deputy Industrial Commissioner, Des Moines, Iowa.

DEAR SIR:

In re Hope vs. C. R. I. & P.

We were unable to appear at the above matter when it was held that decedent was not engaged in interstate commerce. Is it possi-

ble under your practice, to have a rehearing of this matter to give us an opportunity to be present.

Please let us hear from you regarding this.

Very truly yours, Davis & Michel.

In our record also appears as of same date a second letter from claimant's counsel, the body of which is as follows:

Will you kindly have copy of the evidence in the case of Hope [fol. 153] vs. C. R. I. & P. Ry. Co., sent to us, upon which the decision in this matter was based.

We wish to appeal from the award made by your board and will have proper papers filed with you.

Upon receipt of your bill, we will mail check.

March 27, 1923, counsel for claimant was advised by the Industrial Commissioner of the receipt of the letter just quoted, together with the information that this letter would be accepted as notice of claimant's appeal from the decision of the arbitration committee, and that the transcript had been duly only ordered for them as directed in correspondence.

April 24, 1923, notice was given by the commissioner to all parties concerned that review proceeding under the notice of appeal by claimant would occur at the department, May 4, 1923, at 9 A. M.

Under date of April 27, 1923, Davis & Michel advised the Industrial Commissioner of receipt of notice of review proceeding.

The only issue involved in this case is as to whether or not the time of his accidental death, February 4, 1923, C. Y. Hope, husband of this claimant, was engaged in interstate commerce.

Facts developed at the arbitration hearing are substantially as follows:

On the day of his accidental death and for some time previously the deceased was in the employ of the Chicago, Rock Island & Pacific Railway Company as conductor on what is known as a mine-run train, the principal business of which is to haul coal cars to and from what is known as Pershing Siding on its main line along a [fol. 154] spur track leading off of the main line to mines owned and operated by the defendant company.

From the record it would appear that early in the forenoon of February 4th, a train was made up and delivered at Pershing consisting of cars consigned to inter-state and intra-state points. Later in the forenoon a second train was delivered at Pershing consisting wholly of cars consigned to Valley Junction and Allerton, both points intrastate in character.

February 4th fell on Sunday. It would appear to have been the custom of the company to take the engine and caboose under the direction of Conductor Hope to the town of Chariton in order that the train crew might have Sunday dinner with their families living at Chariton, and incidentally to take water for the engine. While proceeding under this arrangement on Sunday, February 4th, a collision with a train on the main line resulted in the death of the conductor.

The last haul of this crew and equipment before the accident was intra-state—cars billed to Allerton and Valley Junction.

According to the record the freight transportation next to follow in afternoon was not within the knowledge of the train men as orders for further service were to be received. While not absolutely controlling, these facts are significant in that they further remove the situation at the time of the accident from the range of inter-state commerce. But the vital fact is as to whether or not at the time of this collision the deceased conductor was engaged in intra-state employment within the meaning of the statute.

At this time the equipment in charge of Mr. Hope was in service [fol. 155] incidental to employment, but was not specifically related to transportation inter or intra-state in character. It had no direct contact with its regular employment of coal hauling. Its mission at that particular time was simply and solely to deliver the train crew to Chariton in accordance with the Sunday custom.

These facts distinctly separate the deceased from inter-state relationship and logically and legally link him with intra-state service. The fact that the engine was to take water at Chariton is merely incidental and by no means serves to establish the character of employment.

In *Smith vs. Interurban Railway Company*, 171 N. W. 134, the Supreme Court of Iowa, speaking through Justice Stevens, delivers opinion bearing upon this situation in reversing the district court and sustaining this department in holding for the widow. In that case an interurban conductor was accidentally killed in the terminal yards at Des Moines while settling his motor and caboose into quarters for the night, immediately following distinct contact with interstate transportation.

This opinion states that "Unless there was some intervening service not directly or immediately connected with inter-state commerce so as substantially to form a part or necessary incident thereof, plaintiff cannot recover." The court held from the facts submitted that "there was some intervening service not directly or immediately connected with inter-state commerce" though but a few minutes previously there was distinct contact with inter-state traffic.

The court seems to give some weight to the fact that the lines of [fol. 156] the defendant company are wholly within the state and that "primarily its business was intra-state." It will be observed, however, that in the case at bar employment at the time of the accident was much more definitely removed from the range of inter-state commerce.

In this opinion Justice Stevens quotes approving from the decision of the Supreme Court of the State of Illinois in *Illinois C. R. vs. Behrens*, 233 U. S. 473, 34 Sup. Ct. 646, 58 L. Ed 1051, Ann. Cas. 19140, 163 as follows:

"Here at the time of the fatal injury the inter-state was engaged in moving several cars, all loaded with intra-state freight, from one part of the city to another. That was not a service in interstate commerce, and so the injury and resulting death were not within the statute. That he was expected, upon the completion of that task,

to engage in another which would have been a part of interstate commerce is immaterial under the statute; for by its terms the true test is the nature of the work being done at the time of the injury."

This reasoning distinctly classifies the case at bar in intrastate relationship.

The court also quotes from a decision of the Supreme Court of the United States in *Erie R. R. Co. vs. Welsh*, 242 U. S. 303, Sup. Ct. 116,631 L. Ed. 319:

"It was in evidence also that the orders plaintiff would have received, had he not been injured on his way to the yardmaster's office, would have required him immediately to make up an interstate train. Upon the strength of this it is argued that this act at the moment of his injury partook of the nature of the work, he would have [fol. 157] been called upon to perform. In our opinion, this view is untenable. By the terms of the Employers' Liability Act, the true test is the nature of the work being done at the time of the injury, and the mere expectation that plaintiff would presently be called upon to perform a task in interstate commerce is not sufficient to bring the case within the act. And this depends upon whether the series of acts that he had last performed was properly to be regarded as a succession of separate tasks or as a single and individual task. It turns upon no interpretation of the act of Congress, but involved simply an appreciation of the testimony and admissible inferences therefrom in order to determine whether there was a question to be submitted to the jury as to the fact of employment in interstate commerce. The state courts held there was no such question, and we cannot say that in so concluding they committed manifest error. It results that, in the proper exercise of the jurisdiction of this court in cases of this character the decision ought not to be disturbed."

The decision of the arbitration committee is affirmed.

Dated at Des Moines, Iowa, this 9th day of May, 1923.

A. B. Funk, Iowa Industrial Commissioner. (Seal.)

[fol. 158] EXHIBIT "G" TO DEFENDANT'S EXHIBIT "D"

Before the Industrial Commissioner of Iowa

In the Matter of the Award of Compensation on Account of the Death  
of C. Y. Hope, Deceased

Mrs. C. Y. Hope, Widow and Appellant,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Applicant  
for Arbitration and Appellee

Notice of Appeal from Commissioner's Order of Affirmance of  
Arbitrator's Finding and Award

Comes now Mrs. C. Y. Hope and appeals unto the District Court of Lucas County from the finding and award of the arbitrators as affirmed by the Industrial Commissioner in the above entitled matter.

The above appeal will come on for hearing at the July, 1923, term of said court, and at a time to be hereafter fixed by the court.

Of all of which notice will be taken by the commissioner and the Chicago, Rock Island & Pacific Railway Company.

Dated at Des Moines, Iowa, this May 17, 1923.

Davis & Michel, R. M. Haines, Attorneys for Appellant.

Service of the above notice is accepted and receipt of copy is acknowledged at Des Moines, Iowa, at the hour of 3:30 o'clock P. M., this May 17, 1923.

J. G. Gamble, R. L. Read, A. B. Howland, Attorneys for C.,  
R. I. & P., Industrial Commissioner.

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EXHIBIT "H" TO DEFENDANT'S EXHIBIT "D"

IN THE DISTRICT COURT OF IOWA IN AND FOR LUCAS COUNTY

In the Matter of the Award of Compensation on Account of the  
Death of C Y. Hope, Deceased

Mrs. C. Y. Hope, Appellant,

vs.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellee

Notice of Hearing Before the District Court on Appeal from the Industrial Commissioner's Decision

To Mrs. C. Y. Hope, plaintiff and appellant, or to Davis & Michel and R. M. Haines, her attorney of record:

You, and each of you, are hereby notified that the application for [fol. 160] appeal from the findings and award of the Iowa In-

dustrial Commissioner in the above entitled matter will come on for hearing before the District Court of Lucas County, Iowa, at the Court House at Chariton, Iowa, on the 2nd day of June, 1923, at 2 o'clock p. m. before the Honorable Francis M. Hunter, presiding judge of said court.

All of which you will take due notice and govern yourselves accordingly.

The Chicago, Rock Island & Pacific Railway Company, Employer and Appellee, by J. G. Gamble, R. L. Read, A. B. Howland, Its Attorneys.

Service of the above notice is hereby accepted and receipt of copy thereof acknowledged on this 23rd day of May, 1923.

Davis & Michel, R. M. Haines.

[fol. 161] IN THE DISTRICT COURT OF IOWA IN AND FOR LUCAS COUNTY

In the Matter of the Award of Compensation on Account of the Death of C. Y. Hope, Deceased

Mrs. C. Y. HOPE, Appellant,

vs.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellee

#### Order

Now on this 24th day of May, 1923, it appearing to the court that ten days' notice of hearing on the appeal has been served upon counsel for the appellant, which notice designates the time for hearing as June 2nd, 1923, at 2 o'clock p. m. at the Court House at Chariton, Lucas County, Iowa, it is ordered by the court that said appeal shall be and the same is hereby set down for hearing at said time and place.

F. M. Hunter, Judge.

[fol. 162] EXHIBIT TO DEFENDANT'S EXHIBIT "D"

IN THE DISTRICT COURT OF THE STATE OF IOWA IN AND FOR LUCAS COUNTY

In the Matter of the Award of Compensation on Account of the Death of C. Y. Hope, Deceased

Mrs. C. Y. HOPE, Appellant,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellee

#### Decree and Judgment Entry

Now on this 2nd day of June, 1923, being one of the regular judicial days of the April, 1923 term of this court, this matter comes



on for hearing on the appeal of Mrs. C. Y. Hope, from the findings and order of the Industrial Commissioner of the State of Iowa, the Chicago, Rock Island & Pacific Railway Company appeared by Jas. A. Penick and A. B. Howland, its attorneys, and the appellant appeared not, and the Court having examined the transcript of the proceedings before the Arbitration Committee, and the decision of the Iowa Industrial Commissioner on review, and being now fully advised in the premises, finds that the Court has jurisdiction over the subject matter of this action; that the parties duly appeared before the Arbitration Committee as provided by law and before the Iowa Industrial Commissioner that ten days' notice in writing [fol. 163] was given to the attorney of record for Mrs. C. Y. Hope, appellant of this hearing, and that the Court has jurisdiction over the parties hereto.

The Court further finds that Mrs. C. Y. Hope, appellant, is the surviving widow of C. Y. Hope, deceased; that the said C. Y. Hope came to his death on account of injuries sustained by him while employed by the Chicago, Rock Island & Pacific Railway Company; and that such injuries arose out of the course of his employment; that the said C. Y. Hope was not at the time of his death engaged in interstate commerce, and that Mrs. C. Y. Hope, as the surviving widow of the said decedent, is entitled to an award of compensation under the Iowa Workmen's Compensation law at the rate of \$15 per week for the statutory period of 300 weeks.

The Court further finds that the decision of the Arbitration Committee and the Iowa Industrial Commissioner, is regular and the decision of the said Arbitration Committee and Industrial Commissioner is supported by the evidence adduced upon the hearing before the Arbitration Committee.

It is, therefore, ordered, adjudged and decreed by the Court that the award of the Arbitration Committee and the decision of the Iowa Industrial Commissioner be and the same hereby is approved and confirmed in all respects. That Mrs. C. Y. Hope have and recover of the appellee, the Chicago, Rock Island & Pacific Railway Company, judgment in the sum of \$4,500, payable at the rate of \$15 per week commencing at the date of the death of the decedent, to-wit February 13, 1923, unless the said Mrs. C. Y. Hope shall die [fol. 164] before the expiration of 300 weeks, in which event said compensation shall be payable to the surviving dependents of the said decedent, if any.

And it is further ordered, adjudged and decreed that Mrs. C. Y. Hope have and recover of the Chicago, Rock Island & Pacific Railway Company the sum of \$100 for medical and surgical services rendered the deceased prior to his death, and the further sum of \$100 for funeral expenses of the said decedent in accordance with the terms of the original award by the Arbitration Committee.

(Signed) F. M. Hunter, Judge.

Plaintiff excepts.

June 2nd, 1923.

## Certificate of Transcript

STATE OF IOWA,

Lucas County, ss:

I, J. L. Hendrickson, Clerk of the District Court of the State of Iowa, in and for said county, do hereby certify, that the foregoing is a true and perfect transcript of the record in the case of Mrs. C. Y. Hope vs. Chicago, Rock Island & Pacific Railway Company as certified by the Industrial Commissioner of Iowa excepting the Transcript of Testimony and Exhibits before the Arbitration Committee and the Record in said cause in the District Court and the judgment entered therein on June 2nd, 1923, as fully as the same [fol. 165] remains on file and of record in my office, and I further certify that said judgment has been entered in the Index of Liens.

In witness whereof, I have hereunto set my hand, and affixed the seal of said Court, at my office, in Chariton, in said county, this 2nd day of June, A. D. 1923.

J. L. Hendrickson, Clerk. (Seal.)

STATE OF IOWA,

Second Judicial District,

Lucas County, ss:

I, F. M. Hunter, one of the Judges of the Second Judicial District of the State of Iowa, and which is composed of the Counties of Walpello, Lucas, Davis in said State of Iowa, do hereby certify that J. L. Hendrickson whose signature is appended to the foregoing certificate, is, and was at the time of signing same, the Clerk of said Court in and for the County of Lucas, and the legal custodian of the files and records thereof; and his signature thereto appended is genuine, and that said attestation is in due form of law.

Dated at Chariton, Iowa, this 2nd day of June, A. D. 1923.

F. M. Hunter, Judge of the Second Judicial District of Iowa.

[fol. 166] STATE OF IOWA,

Lucas County, ss:

I, J. H. Hendrickson, Clerk of the District Court in and for said county, do hereby certify that F. M. Hunter, whose name appears to the foregoing certificate dated the 2nd day of June, A. D. 1923, is now and was at the date thereof, an acting Judge of the District Court in and for said county, duly elected and qualified in conformity with the laws of the state; and that his signature is genuine. And I further certify that the Court of which I am Clerk is a Court of Record using a seal of office, and this certificate is in conformity with the laws of said State.

In witness whereof, I have hereunto set my hand and caused the seal of the Court to be hereto affixed at my office in Chariton, in said county, this 2nd day of June in the year of our Lord, 1923.

J. L. Hendrickson, Clerk of the District Court. (District Court Seal.)

Defendant's Exhibit E.

Schendel vs. C., R. I. &amp; P. R. R. Co.

3-4-24.

[fol. 167]

## DEFENDANT'S EXHIBIT "E"

## Administrator's Petition and Bond

## Copy

STATE OF IOWA,

Polk County, ss:

IN THE DISTRICT COURT OF SAID COUNTY, IN VACATION

In the Matter of the Estate of CLARENCE Y. HOPE, Deceased

## Petition

To the Honorable District Court of said County:

Comes now Hazel H. Hope a resident of said county, and respectfully represents that on or about the 13th day of February, A. D. 1923, Clarence Y. Hope of said county, died intestate, leaving at the time of his death the following heirs, to-wit: Hazel H. Hope, daughter, and having at the time of death personal property in this state, which may be lost, destroyed or diminished in value if speedy care be not taken of the same. To the end therefore that said property and debts may be collected and preserved, I respectfully request the appointment of E. R. Byess with full power and authority to act as Administrator herein according to law. The total value of real and personal property is about \$250.00.

Hazel H. Hope.

Subscribed and sworn to by Hazel H. Hope before me March 10th, 1923. John D. Dennison, Notary Public. (Seal.)

[fol. 165]

STATE OF IOWA,

County of Polk, ss:

I, E. R. Byess do solemnly swear that I will well and truly administer all and singular the goods, chattels, rights, credits and effects of Clarence Y. Hope, deceased, and pay all just claims and charges against his estate, so far as his assets shall extend, and that I will perform all other acts now or hereafter required by law to the best of my knowledge and ability.

E. R. Byess.

Subscribed and sworn to before me by E. R. Byess, this 10th day of March, A. D. 1923. John D. Dennison, Notary Public. (Seal.)

## Copy of Administrator's Bond

American Surety Company of New York

Capital: \$5,000,000

Know all men by these presents: that we, E. R. Byers as principal, and the American Surety Company of New York, as surety, are held and firmly bound unto the County of Lucas and State of Iowa, in the penal sum of Five Hundred and no-100 (\$500.00) Dollars, for the payment of which, well and truly to be made, we bind ourselves, our heirs and successors firmly by these presents.

The condition of the above bond is such, that if the above bound E. R. Byers who has been appointed Administrator of the estate of Clarence Y. Hope, deceased, will render a true account of his office [fol. 169] and of his doings therein to the proper authority, when required thereby or by law; that he will promptly pay over to the officer entitled thereto all moneys or property which may come into his hands by virtue of his office; that he will promptly account for all balances of money remaining in his hands, at the termination of his office; that he will exercise all reasonable diligence and care in the preservation and lawful disposal of all moneys, books, papers, securities or other property appertaining to his said office, and deliver them to his successor, or to any other person authorized to receive the same; and that he will faithfully and impartially, without fear, favor, fraud, or oppression discharge all duties now or hereafter required of his office by law; and the sureties on such bond shall be liable for all moneys or property that may come into the hands of such officer at any time during his possession of such office, then the above obligation is to be void and of no effect, otherwise to be and remain in full force and virtue in law.

Witness our hands, this 10th day of March, A. D. 1923.

E. R. Byers, Principal. American Surety Company of New York, by R. W. Clearman, Resident Vice-President.

Attest: L. H. Hopson, Resident Assistant Secretary.

The above bond was approved and filed this 12th day of March, 1923.

J. L. Hendrickson, Clerk of District Court. (Seal.)

[fol. 170] STATE OF IOWA,  
Polk County, ss:

I, E. R. Byers, do solemnly swear that I will truly, faithfully and honestly discharge all the duties and perform all the trusts committed to my care as the Administrator of the estate of Clarence Y. Hope, late of Chariton, Iowa, Lucas County, deceased, so help me God.

E. R. Byers.

Sworn and subscribed to before me this 10th day of March, A. D. 1923. R. W. Clearman, Notary Public. (Seal.)

## IN THE DISTRICT COURT OF SAID COUNTY, IN VACATION

No. 3292

In the Estate of CLARENCE Y. HOPE, Deceased

## Copy of Letters

STATE OF IOWA,  
Lucas County, ss:

To all to whom these presents shall come, Greeting:

Know yet that, whereas, Clarence Y. Hope, late of the aforesaid county and state, died intestate on or about the 13th day of February, A. D. 1923, having at the time of his decease personal property in this state which may be lost, destroyed or diminished in value, if [fol. 171] speedy care be not taken of the same: To the end, therefore, that said property and debts may be collected and preserved, and administered upon as by law required.

Whereas, E. R. Byers, has this day fully complied with the laws and orders of this Court in relation to giving bond and taking the prescribed oath. Now, therefore, know ye, and all to whom it may concern, that the District Court of Lucas County, in vacation, does hereby appoint and commission E. R. Byers Administrator of all and singular the goods, chattels, rights, credits and effects, which belong to said decedent, Clarence Y. Hope, at the time of his decease, with full power and authority to collect and secure the said property and debts, wheresoever the same may be found in this State, and in general to do and perform all other acts which now or hereafter may be required of him by law.

In witness whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Chariton, this 12th day of March A. D. 1923.

J. L. Hendrickson, Clerk of District Court, by Mary E. Hendrickson, Deputy. (Seal.)

[fol. 172] Order for Notice of Appointment

STATE OF IOWA,  
Lucas County, ss:

Upon consideration hereof, it is hereby ordered and directed by the District Court of said County, that the within named E. R. Byers give notice of his appointment as Administrator of the estate of Clarence Y. Hope, deceased by publishing notice thereof for three consecutive weeks in the Herald Patriot, a newspaper published at Chariton of Lucas County, Iowa.

In testimony whereof, I have hereunto set my hand and cause the seal of said Court to be affixed at Chariton this 12th day of March A. D. 1923.

J. L. Hendrickson, Clerk of District Court, by Mary E. Hendrickson, Deputy. (Seal.)

[fol. 173]

## Certificate

STATE OF IOWA,

Lucas County, ss:

I, J. L. Hendrickson, Clerk of the District Court of Iowa, in and for said County do hereby certify that Clarence Y. Hope died on or about the 13th day of February A. D. 1923, and E. R. Byers was on the 12th day of March 1923, appointed Administrator of his estate.

I further certify that E. R. Byers is the duly qualified and acting Administrator of the estate of Clarence Y. Hope deceased, at this date of June 2, 1923, as fully as the same appears of record or on file in my office.

In witness whereof, I have hereunto set my hand and affixed the seal of the District Court at my office in Chariton Iowa, this second day of June, 1923.

J. L. Hendrickson, Clerk, by Mary E. Hendrickson, Deputy.  
(Seal.)

[fol. 174]

## Certificate of Transcript

STATE OF IOWA,

Lucas County, ss:

I, J. L. Hendrickson, Clerk of the District Court of the State of Iowa, in and for said County, do hereby certify, that the foregoing is a true and perfect transcript of the Administrator's Petition and "Oath" "Administrator's Bond" Letters and "Order for Notice of Appointment" in the estate of C. Y. Hope, Deceased, as fully as the same remains on and of record in my office:

In witness whereof, I have hereunto set my hand and affixed the seal of said Court, at my office, in Chariton, in said County, this 2nd day of June, A. D. 1923.

J. L. Hendrickson, Clerk. (Seal.)

STATE OF IOWA,

Second Judicial District,

Lucas County, ss:

I, F. M. Hunter one of the Judges of the Second Judicial District of the State of Iowa, and which is composed of the counties of Appanoose, Davis, Jefferson, Lucas, Monroe, Van Buren and Wapello in said State of Iowa, do hereby certify that J. L. Hendrickson whose signature is appended to the foregoing certificate, is, and was at the time of signing the same, the Clerk of said Court in and for the [fol. 175] county of Lucas, and the legal custodian of the files and records thereof; and his signature thereto appended is genuine, and that said attestation is in due form of law.

Dated at Chariton Iowa, this 2nd day of June A. D. 1923.

F. M. Hunter, Judge of the Second Judicial District of Iowa.

STATE OF IOWA,  
Lucas County, ss:

I, J. L. Hendrickson, Clerk of the District Court in and for said County, do hereby certify that F. M. Hunter, whose name appears to the foregoing certificate dated the second day of June A. D. 1923, is now, and was at the date thereof, an acting Judge of the District Court in and for said County, duly elected and qualified in conformity with the laws of the State; and that his signature is genuine. And I further certify that the Court of which I am the Clerk is the Court of Record, using a seal of office, and this certificate is in conformity with the laws of said State.

In witness whereof, I have hereunto set my hand and caused the seal of the Court to be hereunto affixed at my office in Chariton, in said County, this 2nd day of June in the year of our Lord, 1923.

J. L. Hendrickson, Clerk.

[fol. 176]

DEFENDANT'S EX. F

STATE OF IOWA,  
County of Polk, ss:

I, W. G. B., Judge of the District Court of the State of Iowa in and for Polk County do hereby certify that the attached certification and attestation of the petition at law and original notice in the cause of E. R. Byers, Administrator of the Estate of Clarence Y. Hope, deceased, Plaintiff, vs. The Chicago, Rock Island & Pacific Railway Company, Defendant, made by W. D. Baldwin, Clerk of the District Court of the State of Iowa, in and for Polk County, is in due form.

And I do further certify that the said W. D. Baldwin is the Clerk of the District Court of the State of Iowa, in and for Polk County and that he has duly qualified as such Clerk of the District Court of Polk County, Iowa.

In Witness Whereof, I have hereunto set my hand and caused the seal of the District Court of Iowa in and for Polk County, to be hereto affixed this 2nd day of June, 1923.

W. G. B., Judge of the District Court of Iowa in and for Polk County.

[fol. 177] STATE OF IOWA,  
County of Polk, ss:

I, W. D. Baldwin, Clerk of the District Court of Polk County, Iowa, do hereby certify that the papers attached hereto are true and correct copies of the petition at law in a cause entitled E. R. Byers, Administrator of the Estate of Clarence Y. Hope, deceased, Plaintiff, vs. The Chicago, Rock Island & Pacific Railway Company, Defendant, No. 33046 Law, and the original notice in the same cause, together with the return of the Sheriff of this County

of the service of said notice as fully as the same remains of record in my office.

And I do further certify that said cause of E. R. Byers, Administrator of the Estate of Clarence Y. Hope, deceased, Plaintiff, vs. The Chicago, Rock Island & Pacific Railway Company is still pending in the District Court of the State of Iowa, in and for Polk County.

In Witness Whereof, I have hereunto set my hand and affixed the seal of the District Court of the State of Iowa in and for Polk County at my office in Des Moines, Iowa, this 2nd day of June, 1923.

W. D. Baldwin, Clerk of the District Court of Iowa in and for Polk County. (Seal.)

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[fol. 178] IN THE DISTRICT COURT OF THE STATE OF IOWA IN AND FOR POLK COUNTY, JULY TERM, A. D. 1923

No. 33046. Law

E. R. BYERS, Administrator of the Estate of Clarence Y. HOPE,  
Deceased, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY,  
Defendant

Petition at Law

Comes now the plaintiff and for cause of action states:

That he is the duly appointed qualified and acting administrator of the Estate of Clarence Y. Hope, deceased.

That the defendant, The Chicago, Rock Island & Pacific Railway Company, is a corporation for pecuniary profit, organized under the laws of the State of Iowa, and is engaged in operating lines of railway through Polk County and through the State of Iowa, and adjoining states, and has been so engaged for five years last past. That said railway is a common carrier engaged in passenger and freight traffic over its said lines.

That on the 4th day of February, 1923, and for several years [fol. 179] prior thereto, Clarence Y. Hope, deceased of whose estate the plaintiff is administrator, was in the employ of said defendant railway company as a conductor of a freight train, which freight train prior to and on said date had been operating on that part of defendant's lines situated in Lucas County, Iowa, and between the town of Chariton on said line and the City of Des Moines, Iowa, and particularly at coal mines located on defendant's lines between said named cities.

That on the 4th day of February, 1923, the said Clarence Y. Hope was in charge of his said freight train and engaged in taking



empty freight cars to mines No. 2 and No. 3 of the Central Iowa Fuel Company located on defendant's spur tracks leading off from defendant's main line in Lucas County, Iowa, and in bringing out loaded cars from said mines to the station known as Pershing, Iowa, on said defendant's main line in Lucas County, Iowa. That the said Clarence Y. Hope and his train crew brought from said mines a train of loaded coal cars on the 4th day of February, 1923, and placed the same on defendant's side tracks at said station of Pershing. That at the station of Pershing there was no agent employed or maintained by the defendant company, and the said Clarence Y. Hope, conductor of said freight train, was required to telephone from the station to train dispatcher at Des Moines, Iowa, for orders and information as to whether defendant's main line railway track between the station of Pershing and the station of Chariton was open for the use of the freight train of said Clarence Y. Hope, conductor, it being the purpose of said Clarence Y. Hope to take his [fol. 180] freight train to Chariton in order that the boiler might be supplied with water, and while the engine was being filled with water the crew were to have their dinner. That the train dispatcher at Des Moines advised the said Clarence Y. Hope over the telephone that the eastward extra train would wait at Chariton until 1:30 P. M. and that all first class trains due at Pershing before 12:10 P. M. had arrived or left. That thereupon the said Clarence Y. Hope left the station of Pershing with his train consisting of engine, tender and caboose, backing on the main line of defendant's track for the City of Chariton at about twelve o'clock noon.

That there is a curve in the main line track of defendant's railway a little ways south of the station of Pershing, and while the freight train of the said Clarence Y. Hope was proceeding southward on the main line track beyond this curve for the station of Chariton it was overtaken by a fast passenger train south bound on said main line track at a point a little beyond said curve, and said fast passenger train collided with the engine of the freight train with great force and violence. That at the time of said collision the said Clarence Y. Hope was in the caboose of the freight train, and the impact of the collision caused the caboose to be detached from the engine and tender, and was driven with great force for a distance of about sixty feet or more where the caboose was thrown from the track and down the embankment, turning over immediately and catching fire and burning up. That the said Clarence Y. Hope, conductor, received severe physical injuries and internal injuries from inhaling smoke and gas, which injuries caused the death of the [fol. 181] said Clarence Y. Hope on the 13th day of February, 1923.

The plaintiff further states that the said Clarence Y. Hope, at the time of said collision and injuries received because of said collision, was engaged in interstate commerce.

That plaintiff further states that between the date of said injury on the 4th day of February, 1923, and the 13th day of February, 1923, the date on which said Clarence Y. Hope died, he suffered and sustained great physical and mental pain and anguish continually on account of said injuries.

The plaintiff further states that the said Clarence Y. Hope, deceased, left surviving him a widow Jessie Hope, and a daughter Hazel Helen Hope, beneficiaries, both of whom he had contributed and was contributing from his earnings and wages earned prior to his death, and the said Jessie Hope, widow, and Hazel Helen Hope, daughter, were dependents upon the said Clarence Y. Hope at the time of his death.

The plaintiff further states that the train dispatcher of the defendant railway company, in stating to the said Clarence Y. Hope, conductor, in effect, that the main railway line of the defendant between Pershing and Chariton was open for the use of said freight train, misled the said Clarence Y. Hope and caused him to leave the station of Pershing for the station of Chariton in the belief that the said main line of defendant's railway between Pershing and Chariton was open to the said Clarence Y. Hope over which he might run his [fol. 182] train without danger of collision with any other train, and the said train dispatcher was negligent in that he did not inform the said Clarence Y. Hope that the South bound passenger train had the right of way between Pershing and Chariton, and the negligence of the said train dispatcher was the negligence of the defendant railway company, and said negligence of the dispatcher and defendant railway company was the direct and proximate cause of the injury to and death of the said Clarence Y. Hope.

The Plaintiff further states that the said Clarence Y. Hope, before and at the time of said collision and injury which followed, was in the exercise of ordinary care for his own protection and did not in any manner or degree contribute to the injuries received by him on account of said collision which resulted in his death.

Wherefore, Plaintiff demands judgment against said defendant, The Chicago, Rock Island & Pacific Railway Company, in the sum of Twenty-five Thousand Dollars, together with interest thereon at the rate of six per cent per annum from the date of the rendition of the verdict herein and for all costs of this action.

Thos. A. Cheshire, Attorney for Plaintiff.

[fol. 183] STATE OF IOWA.

County of Polk, ss:

I, E. R. Byers, being first duly sworn on oath deposes and say that I am plaintiff in the above entitled cause, that I have heard the above and foregoing petition read and believe the statements therein made are true.

E. R. Byers.

Subscribed and sworn to before me and in my presence by the said E. H. Byers, administrator of the estate of Clarence Y. Hope, deceased, this 14th day of May, 1923. Thos. A. Cheshire, Notary Public in and for Polk County, Iowa.

[fol. 184] IN THE DISTRICT COURT OF THE STATE OF IOWA AND FOR  
POLK COUNTY, JULY TERM, A. D. 1923

E. R. BYERS, Administrator of the Estate of Clarence Y. Hope,  
Deceased, Plaintiff,

vs.

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,  
Defendant

Original Notice

To the Chicago, Rock Island & Pacific Railway Company:

You are hereby notified that on or before the 15th day of May, A. D. 1923, the petition of the plaintiff in the above entitled matter will be filed in the office of the Clerk of the District Court of the State of Iowa, in and for Polk County, Iowa, claiming of you the sum of Twenty-five Thousand (\$25,000.00) Dollars, money as justly due from you, and interest thereon at 6 per cent from the — day of the rendition of the verdict, herein, as damages sustained by the wrongful death of Clarence Y. Hope, on account of and because of the negligence of the defendant, The Chicago, Rock Island & Pacific Railway Company.

[fol. 185] NOTICE OF ATTORNEY'S LIEN

To the Chicago, Rock Island & Pacific Railway Company:

You are hereby notified that the undersigned claims an attorney's lien in the sum of Ten Thousand (\$10,000.00) Dollars on any money in your hands due or to become due the plaintiff on the claim made by plaintiff in this suit, for services as his attorney in above entitled cause.

You may govern yourself accordingly.

Thos. A. Cheshire.

For further particulars see petition, and unless you appear thereto and defend before noon of the second day of the next term, being the July term of said Court, which will commence at Des Moines, Polk County, Iowa, on the 2nd day of July, 1923 default will be entered against you and judgment and decree rendered thereon.

Dated this 14th day of May, 1923.

Thos. A. Cheshire, Attorney for Plaintiff.

STATE OF IOWA,  
Polk County, ss:

Received the within notice this 14th day of May, 1923, and on the 14th day of May, 1923, I personally served the same on the within named defendant, The Chicago, Rock Island & Pacific Railway Co., by offering to read the original to W. H. Heath, freight agent

of said company, which he waived and delivered to him a true copy thereof. All done in Polk County, Iowa.

(Signed) Park A. Findley, Sheriff Polk County, Iowa.  
James L. McGuire, Deputy.

[fol. 186]

#### STIPULATION RE EVIDENCE

It is stipulated that the foregoing transcript of testimony, consisting of eighty-eight (88) typewritten pages, together with all original exhibits introduced in evidence and on file with the Clerk of this Court, to-wit: Plaintiff's Exhibits 1, 2 and 3, and Defendant's Exhibits "A" to "F" inclusive, may be by the Court, without notice, signed and allowed as and for the Settled Case herein.

Dated July 14, 1924.

Davis & Michel, Attorneys for Plaintiff. O'Brien, Horn & Stringer, Attorneys for Defendant.

#### IN DISTRICT COURT OF STEELE COUNTY

#### ORDER SETTLING CASE

The foregoing transcript, consisting of eighty-eight (88) typewritten pages, having been examined by me and found conformable to the truth, said transcript, together with all original exhibits introduced in evidence and now on file with the Clerk of this Court, to-wit: Plaintiff's Exhibits 1, 2 and 3, and Defendant's Exhibits "A" to "F" inclusive, may be, and the same hereby is signed, settled and allowed as and for the Settled Case herein, as containing all testimony, offers, exhibits, objections, exceptions, motions and rulings, and all other proceedings had or taken at the trial of the above entitled action.

Dated July 14, 1924.

Fred W. Senn, District Judge.

[fol. 187] IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

VERDICT—March 4, 1924

We, the jury empaneled and sworn in the above entitled action, find for the plaintiff and assess his damages in the sum of \$26,047.50, Twenty-six Thousand Forty-seven and 50-100 Dollars.

Dated at Owatonna, Minn., this 4th day of March, A. D. 1924.

John Burrock, Foreman.

[fol. 188] IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

MOTION FOR JUDGMENT OR A NEW TRIAL

To Davis & Michel, E. S. Cary, and Leach & Leach, attorneys for plaintiff, and to said plaintiff:

SIR: Please take notice, that the defendant moves the Court for an order directing the entry of judgment in favor of the defendant and against the plaintiff, notwithstanding the verdict of the jury herein, and that plaintiff take nothing by this action, on the following grounds:

1. Because, upon the evidence as it stood at the time defendant's motion for a directed verdict in its favor was made, the defendant was entitled to such directed verdict.

2. Because it conclusively appeared from all of the testimony that plaintiff's decedent was, at the time he sustained his injuries resulting in his death, not engaged in interstate commerce, but was on the [fol. 189] contrary engaged in commerce wholly within the state of Iowa, and that the Federal Employers' Liability Act of the United States of April 22nd, 1908, as amended, had, and has no application to this case, but that the rights of the plaintiff and the defendant were, and are, wholly governed by the Workmen's Compensation Act of the state of Iowa.

3. Because it conclusively appeared that the District Court of Lucas County, Iowa, a court of competent jurisdiction of the State of Iowa, had adjudged and decreed that plaintiff's decedent was not, at the time of his injuries, engaged in interstate commerce, but that he was on the contrary, engaged in commerce wholly within the state of Iowa, and that said court had awarded compensation for plaintiff's decedent's injuries and death under the Workmen's Compensation Act of the State of Iowa, and that said judgment of the District Court of Lucas County, Iowa, was and is res adjudicata, and was and is conclusive and binding upon this court under Section 1, of Article IV, of the Constitution of the United States.

4. Because it conclusively appeared that plaintiff was not and is not the "personal representative" of said decedent, Clarence Y. Hope, within the meaning of the Federal Employers' Liability Act of the United States, of April 22nd, 1908, as amended, but that on the contrary the only "personal representative" of said decedent was and is E. R. Byers, the administrator appointed by the District Court of Lucas County, Iowa, where said decedent resided at the time of his death.

5. Because it conclusively appeared that the plaintiff had no title [fol. 190] to the cause of action alleged and set forth in the complaint herein, or right to bring any action upon said alleged cause of action, and that the Federal Employers' Liability Act of the

United States of April 22nd, 1908, as amended, should be so construed.

You will further take notice, that if the Court should not grant, but on the contrary, should deny said defendant's motion for judgment notwithstanding the verdict, then and in that event, the defendant moves the Court for an order vacating and setting aside the verdict of the jury herein, and for a new trial of this action, on the following grounds, viz:

1. Because said verdict is not justified by the evidence.
2. Because said verdict is contrary to law.
3. Because of errors of law occurring at the trial and duly excepted to by the defendant at the time.
4. Because of excessive damages appearing to have been given by the jury under the influence of passion and prejudice.
5. Because of the following errors of law occurring at the trial and herein specially assigned, to-wit:
  - a. The Court erred in refusing to direct a verdict in favor of the defendant, and against the plaintiff.
  - b. The Court erred in refusing to hold as a matter of law, that plaintiff's decedent was not engaged in interstate commerce at the time of his injury, and in refusing to hold that plaintiff's decedent was, at the time of his injury, engaged wholly in commerce within the state of Iowa.
  - [fol. 191] c. The Court erred in submitting to the jury the question of whether plaintiff's decedent was engaged in interstate commerce at the time of his injuries.
  - d. The Court erred in sustaining plaintiff's objection to the introduction of defendant's Exhibit "C," and in excluding said exhibit from the evidence, said exhibit being an exemplified copy of the Workmen's Compensation Act of the State of Iowa; for the reason that it conclusively appeared that said Workmen's Compensation Act of the State of Iowa governed exclusively the rights of the parties to this action.
  - e. The court erred in sustaining plaintiff's objection to the introduction of defendant's Exhibit "D," and in excluding said exhibit from the evidence, said "Exhibit "D" being an exemplified copy of the judgment of the District Court of the County of Lucas, Iowa, whereby it was adjudged and decreed that plaintiff's decedent was not at the time of his injury, engaged in interstate commerce, but was on the contrary engaged wholly in commerce within the state of Iowa only, for the reason that said judgment was and is res-judicata and binding upon this Court under Section 1, of Article IV, of the Constitution of the United States, and its exclusion from the evidence deprived this defendant of its rights under said United States Constitution.
  - f. The Court erred in sustaining plaintiff's objection to the introduction of defendant's Exhibit "E," and in excluding said exhibit from the evidence, said exhibit being an exemplified copy of

letters of administration of the estate of Clarence Y. Hope, deceased, duly issued by the District Court of Lucas County, Iowa to E. R. [fol. 192] Byers, for the reason that said exhibit conclusively showed that plaintiff was not the "personal representative" of said deceased, within the meaning of the Federal Employers' Liability Act of the United States of April 22nd, 1908, as amended.

g. The Court erred in sustaining plaintiff's objection to the introduction of defendant's Exhibit "F," and in excluding said exhibit from the evidence, said exhibit being an exemplified copy of the proceedings in a certain action pending in the District Court of Holt County, Iowa, brought by E. R. Byers, the domiciliary administrator of the estate of Clarence Y. Hope, deceased, duly appointed by the District Court of Lucas County, Iowa, for the reason that such exhibit conclusively shows that the plaintiff had no title to the cause of action set forth in the complaint herein, and had no right to bring any action therefor.

Said motion is made upon all the records and files in this cause, and upon a case to be settled and allowed by the Court.

O'Brien, Horn & Stringer, Attorneys for Defendant, 1116 Pioneer Building, St. Paul, Minnesota.

Due and personal service of the within notice of motion is hereby admitted, this 30th day of April, 1924.

The hearing of said motion will be had at the time and place convenient and satisfactory to the Court and counsel, and to be agreed upon. Until the hearing of said motion, it is agreed that all proceedings herein be stayed.

Davis & Michel and E. S. Carey, Attorneys for Plaintiff.

I

[fol. 193] IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

#### ORDER DENYING MOTION FOR JUDGMENT OR A NEW TRIAL

The above entitled matter came on for hearing before the court at Mantorville, Minnesota, on the 14th day of July, 1924, upon the motion of the defendant for an order setting aside the verdict of the jury herein and granting to the defendant judgment as against the plaintiff, or, in the alternative, for an order setting aside the verdict of the jury herein and granting to the defendant a new trial of said cause. O'Brien, Horn & Stringer, Esqs., St. Paul, Minn., appeared for the defendant in support of said motions, and Davis & Michel, Esqs., and E. S. Cary Esq., Minneapolis, Minn., and Leach & Leach, Esqs., Owatonna, Minn., appeared for the plaintiff. The matter was submitted upon a settled case herein, upon all the records and files in said cause and upon the oral arguments and briefs of counsel. After due consideration

It is ordered that said motions be and the same are in all things denied.

Fred W. Senn, District Judge.

[fol. 194] IN DISTRICT COURT OF STEELE COUNTY

MEMORANDUM

This action is brought under the Federal Employers' Liability Act. The plaintiff was the conductor of a work train on defendant's railway engaged in hauling cars in and out of the coal mines near Pershing Siding, Iowa. It was the duty of this crew to place loaded cars for shipment upon the tracks at Pershing Siding in such order that east bound or west bound trains might pick them up and carry them to their destination. At noon on the day of the accident, the switching crew was given permission to proceed to Chariton, Iowa, for dinner and for water over the main line of the defendant railroad. After going into the main line at Pershing Siding the work train was struck by a thru passenger train from Minneapolis to Kansas City going in the same direction. The caboose of the work train was demolished and plaintiff's intestate, Clarence Y. Hope, was killed.

The defendant upon the trial of the case admitted that its negligence was the direct and proximate cause of the collision which resulted in the death of Hope. The work train was given the use of the main line to proceed to Chariton at a time when a thru passenger train had the right of way.

The Court submitted to the jury the question as to whether Clarence Y. Hope and defendant at the time of the collision were engaged in interstate commerce and if they were so engaged then the question of the amount of damages that plaintiff is entitled to recover.

It appears that just prior to the collision plaintiff was engaged in [fol. 195] moving loaded coal cars for interstate shipment. The jury found that Clarence Y. Hope and defendant were as a matter of fact engaged in interstate commerce and returned a verdict for the plaintiff.

The instant case was started in Steele County in February, 1923, thereafter and in March, 1923, the defendant company instituted proceedings before the Industrial Commission of the State of Iowa, which determined the character of Hope's employment and made an award of \$15.00 per week for three hundred weeks, payable to decedent's widow. Upon an appeal to the District Court of Iowa, the determination of the Commission was affirmed and judgment was rendered.

The defendant now claims that the plaintiff is barred from making any recovery in this action on account of the rendition of this judgment; that the Iowa tribunal's determination that plaintiff was engaged in interstate commerce is binding upon this court and that the order of the Industrial Commission is *res adjudicata*.

This contention of the defendant cannot be sustained. The Court takes the view that the Federal law supersedes all state laws, rules or regulations governing the same subject.



Cases cited by counsel for plaintiff are in point.

Seaboard Air Line Co. vs. Horton, 233 U. S., 492.

Employers' Liability Cases, 223 U. S. 1.

Erie Ry. Co. vs. Winfield, 244 U. S. 170.

New York Ry. Co. vs. Winfield, 244 U. S. 147.

I think the claims of estoppel and res adjudicata as made by the defendant are disposed of by the cases of,—

[fol. 196] Troxell vs. D. L. & W. R. Co., 227 U. S., 434.

St. L. I. M. & S. R. Co. vs. Hesterly, 228 U. S., 700.

Philadelphia & R. R. Co. vs. Hancock, 253 U. S., 284.

The proceedings before the Industrial Commission in Iowa were instituted by the defendant. The widow of decedent objected to those proceedings. At the instance of the railroad company an administrator was appointed and the defendant's liability was determined before the commission and on appeal in the District Court of Iowa. The plaintiff and not the defendant had the election as to how the suit should be brought. To permit the defendant to institute proceedings in its own way in a state tribunal under a state law and to do so even after plaintiff has instituted this action would defeat the object and the purpose of the Federal Act. Undoubtedly it was the defendant's purpose to accomplish that result. The defendant further sought to interfere with plaintiff's action by enjoining plaintiff's witnesses, through an injunctive order of the Iowa courts from appearing and testifying in this court.

In *Chicago, M. St. P. Ry. Co. vs. Schendel*, 292 Fed., Rep. 326, the rule was enunciated that a court of equity may not enjoin the bringing of an action in another jurisdiction on the ground of hardships or inconvenience to defendant and witnesses when the right to sue in such other jurisdiction is given by law. Under the Employers' Liability Act providing that actions thereunder for injury or death of employees may be brought in the Federal court in the district of the residence of the defendant, or in which the cause of [fol. 197] action arose, or in which the defendant shall be doing business at the time of commencing such action, and giving to the State Courts concurrent jurisdiction, such jurisdiction cannot be interfered with by a state thru its legislature or courts. It was the duty of this court to try the instant case under the existing law. If practice and policy require that a change be made in the mode of bringing suits under this act such change must undoubtedly come thru federal legislation and not thru the interference of state courts thru the entry of judgments or the issuance of injunctive orders.

Further, I am of the opinion that there is no identity of parties in the proceedings before the Iowa Industrial Commission and the parties to this action.

It was necessary for the representative of the decedent to bring the action, and it could not have been maintained by the widow in whose favor the Industrial Commission made its award.

The plaintiff interstate and the defendant were engaged in in-

terstate commerce under the verdict of the jury and I think the question was properly submitted.

The Iowa tribunal was without authority to render an order and judgment which is conclusive upon this court and which will defeat a right given to the plaintiff by Congress.

The defendant admits negligence. The questions of contributory negligence and assumption of risk are not in the case. The record sustains the amount of the verdict returned by the jury.

Senn.

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[fol. 198] IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

JUDGMENT—September 18, 1924

This cause having been regularly placed upon the Calendar of the above named Court for the December A. D. 1923, Regular Term thereof, came on for trial before the Court and a Jury duly empanelled and sworn to try the same on the Fourth day of March A. D. 1924, which said Jury did on the Fourth day of March A. D. 1924, duly render a verdict herein which, in substance, is as follows:

"We, the jury empanelled and sworn in the above entitled action, find for the plaintiff and assess his damages in the sum of \$23,047.50—Twenty-six Thousand Forty-seven Dollars and 50-100 Dollars.

Dated at Owatonna, Minn., this 4th day of March A. D. 1924.

John Burrock, Foreman.

Now, pursuant to said verdict and on motion of Ernest A. Michell, [fol. 199] one of the attorneys for plaintiff it is hereby adjudged that the Plaintiff recover of the Defendant and each of them the sum of (\$26,894.04) Twenty-six Thousand Eight Hundred Ninety-four and 04-100 Dollars, the amount of said Verdict and interest to date hereof, together with (\$37.68) Thirty-seven and 68-100 Dollars cost and disbursements, as taxed and allowed, amounting in all to the sum of (\$26,931.72) Twenty-six Thousand Nine Hundred Thirty-one and 72-100 Dollars.

By the Court:

Bernard McGovern, Clerk District Court. (Court Seal.)

## IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

## NOTICE OF APPEAL

To Messrs. Davis & Michel, attorneys for plaintiff, and to Bernard McGovern, Esq., clerk of the District Court of Steele County, Minnesota:

[fol. 200] SIRs: Please Take Notice, That the above named defendant appeals to the Supreme Court of the State of Minnesota, from the judgment in the above entitled action, entered and docketed on September 18, 1924, by which it was adjusted and decreed that plaintiff recover of the defendant the sum of Twenty-six Thousand Nine Hundred Thirty-one and 72-100ths (\$26,931.72) Dollars. Said appeal is from the whole of said judgment, and from each and every part thereof.

Respectfully, O'Brien, Horn & Stringer, Attorneys for Defendant, 1116 Pioneer Building, St. Paul, Minnesota.

Due and personal service of the above notice of appeal is hereby admitted, this 22nd day of September, 1924.

Davis & Michel, Attorneys for Plaintiff.

Due and personal service of the above notice of Appeal is hereby admitted, this 26th day of September, 1924.

Bernard & McGovern, Clerk District Court, Steele County, Minnesota.

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[fols. 201-204] BOND ON APPEAL FOR \$30,000—Approved; omitted in printing

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[fol. 205] IN SUPREME COURT OF MINNESOTA

A. D. SCHENDEL, as Special Administrator of the Estate of Clarence Y. Hope, Deceased, Respondent,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant

## ASSIGNMENTS OF ERROR

The court erred:

1. In refusing to direct a verdict in favor of defendant and against plaintiff.
2. In refusing to hold, as a matter of law, that plaintiff's decedent was not at the time of his injury engaged in interstate commerce

and in refusing to hold that he was on the contrary engaged in commerce wholly within the state of Iowa, and in holding this to be a question of fact for the jury.

3. In refusing to hold that the judgment of the District Court of Lucas county, Iowa, by which it was adjudged that plaintiff's [fol. 206] decedent was not engaged in interstate commerce was res judicata and binding and conclusive upon the court and the plaintiff herein, thereby refusing to give full faith and credit to the judgment of the court of Iowa contrary to Section 1 of Article 4 of the Constitution of the United States, and denying to the defendant-appellant its constitutional rights thereunder.

4. In holding that plaintiff was the personal representative of the estate of said decedent within the meaning of the Federal Employers' Liability Act of April 22, 1908, as amended and in so construing said Federal Employers' Liability Act.

5. In holding that plaintiff had title to the cause of action alleged in the complaint and had a right to prosecute this action and in so construing the Federal Employers' Act as amended.

6. In denying the defendant's motion for judgment in its favor notwithstanding the verdict of the jury against it.

7. In denying defendant's motion to set aside the verdict and for a new trial of this action:

A. Because said verdict was not justified by the evidence.

B. Because said verdict was contrary to law.

C. Because of errors of law occurring at the trial and duly excepted to by the defendant at the time.

[fol. 207] D. Because of excessive damages appearing to have been given by the jury under the influence of passion and prejudice.

E. Because of the following errors of law occurring at the trial and herein specifically assigned, to-wit:

(a) The court erred in refusing to direct a verdict in favor of the defendant and against the plaintiff.

(b) The court erred in refusing to hold as a matter of law, that plaintiff's decedent was not engaged in interstate commerce at the time of his injury, and in refusing to hold that plaintiff's decedent was, at the time of his injury, engaged wholly in commerce within the state of Iowa.

(c) The court erred in submitting to the jury the question of whether plaintiff's decedent was engaged in interstate commerce at the time of his injuries.

(d) The court erred in sustaining plaintiff's objection to the introduction of defendant's Exhibit "C," and in excluding said exhibit.

bit from the evidence, said exhibit being an exemplified copy of the Workmen's Compensation Act of the State of Iowa; for the reason that it conclusively appeared that said Workmen's Compensation Act of the State of Iowa governed exclusively the rights of the parties to this action.

(e) The court erred in sustaining plaintiff's objection to the introduction of defendant's Exhibit "D," and in excluding said exhibit from the evidence, said Exhibit "D" being an exemplified copy of the judgment of the District Court of the County of Lucas, [fol. 208] Iowa, whereby it was adjudged and decreed that plaintiff's decedent was not at the time of his injury, engaged in interstate commerce, but was on the contrary engaged wholly in commerce within the state of Iowa only, for the reason that said judgment was and is res-judicata and binding upon this court under Section 1, of Article IV, of the Constitution of the United States, and its exclusion from the evidence deprived this defendant of its rights under said United States Constitution.

(f) The court erred in sustaining plaintiff's objection to the introduction of defendant's Exhibit "E," and in excluding said exhibit from the evidence, said exhibit being an exemplified copy of letters of administration of the estate of Clarence Y. Hope, deceased, duly issued by the District Court of Lucas county, Iowa, to E. R. Byers, for the reason that said exhibit conclusively showed that plaintiff was not the "personal representative" of said deceased, within the meaning of the Federal Employers' Liability Act of the United States of April 22nd, 1908, as amended.

(g) The court erred in sustaining plaintiff's objection to the introduction of defendant's Exhibit "F," and in excluding said exhibit from the evidence, said exhibit being an exemplified copy of the proceedings in a certain action pending in the District Court of Hold County, Iowa, brought by E. R. Byers, the domiciliary administrator of the estate of Clarence Y. Hope, deceased, duly appointed by the District Court of Lucas county, Iowa, for the reason that such exhibit conclusively shows that the plaintiff had no title to the cause of action set forth in the complaint herein, and had [fol. 209] no right to bring action therefor.

8. In entering judgment in favor of plaintiff and against defendant, thereby violating Section 1, of Article IV, of the Constitution of the United States, and depriving this defendant of its constitutional rights under said section and article of the constitution.

[fol. 210]

[File endorsement omitted]

## IN SUPREME COURT OF MINNESOTA

[Title omitted]

OPINION—Filed June 19, 1925

## Syllabus

1. The plaintiff's intestate was a conductor on a train hauling coal cars from the mines to a station on the defendant's main line. On the day of his death his crew hauled a drag containing two interstate cars, and a second drag of all intrastate cars. At the station, under his direction, the second drag was pushed against the first and the brakes on the two interstate cars and one intrastate were set by the brakeman at a desired point on the sidetrack. At the mines the conductor received manifests showing the destination of the cars. This information he [fol. 211] telephoned to the operator at a nearby station, and from such information the operator made the shipping bills. The decedent either gave the manifests to the operator or mailed them from the station where he lived. As soon as the brakes were set, which was the last movement in the transportation of the cars, the crew started with the engine and caboose to the station where its members lived for dinner and for water for the engine, intending to return in the afternoon. A rear end collision occurred through the fault of the train dispatcher. The manifests were in the caboose and were burned. If the deceased had reached the station he would have mailed them to the operator. Whether the deceased was employed in interstate commerce was for the jury.
2. After the plaintiff's action under the Federal liability act was commenced, the defendant, as permitted by the compensation act of the state where the accident occurred, instituted a proceeding, making the widow of the deceased a party, for the fixing of compensation. The widow answered, objecting that her rights were not controlled by the compensation act, but by the Federal liability act. She took no part in the proceeding except to answer and appeal. An award was made, and it was pleaded by supplemental complaint as a bar upon the question whether the decedent was employed in interstate commerce. It is held that under the Federal act the plaintiff had a right to have his right determined in the [fol. 212] courts designated by the act, such courts being courts proceeding according to the general course of the common law, and that an award in a later summary compensation proceeding was not a bar.
3. An action under the Federal act can be maintained only by the personal representative, not by the beneficiary. The bene-

✓ ficiary, not the personal representative, is a party in the compensation proceeding. It is held, following *Dennison v. Payne*, 293 F. 333, 342, that there was not an identity of parties so that an estoppel by the award could be invoked.

4. An action under the Federal liability act may be maintained by a special administrator.
5. The verdict is not excessive.

Judgment Affirmed.

### Opinion

Action under the Federal Employers' Liability act to recover for the death of Clarence Y. Hope, plaintiff's intestate, an employe of the defendant. There was a verdict for the plaintiff. The defendant's motion for judgment notwithstanding the verdict or a new trial was denied. The defendant appeals from the judgment entered upon the verdict.

The decedent's death occurred in Iowa in a rear-end collision between a through passenger train and an engine and caboose upon which the deceased and other members of the crew were going home [fol. 213] to dinner after hauling state and interstate cars from the coal mines to the defendant's main line. The accident was caused by the fault of the train dispatcher in letting the engine and caboose onto the main line in front of the coming passenger train. The defendant concedes negligence.

The questions are:

(1) Whether the evidence sustains the finding of the jury that the deceased was employed in interstate commerce.

(2) Whether the proceedings taken in Iowa under its compensation act, upon the initiative of the defendant, after the commencement of this action, resulting in an award to the widow of the decedent, bars a recovery upon the ground that it was there determined that the deceased was engaged in intrastate commerce.

(3) Whether there is such identity of parties as to make the finding that the decedent was employed in intrastate commerce available as an estoppel.

(4) Whether the action may be maintained by a special administrator.

(5) Whether the verdict is excessive.

1. The decedent Clarence Y. Hope, was the conductor of a train engaged in hauling cars from coal mines in Iowa to Pershing on the defendant's main line ten miles away. He and the rest of the crew lived at Chariton on the main line southerly of Pershing. On the morning of February 4, 1923, the plaintiff and his crew left Chariton, went to Pershing, and commenced the work of hauling the [fol. 214] loaded cars of coal from the mines to the Pershing yards.

The first drag was of eleven cars, of which two were interstate. The second drag was of ten cars, all intrastate. Under the directions of Hope the second drag was shoved against the first on a sidetrack and the brakes set on the two interstate cars and one other. Apparently this was done to convenience the work yet remaining. This work was the last which the crew did in the physical movement of the two interstate cars, or in the transportation of any coal cars. The hauling of interstate cars from the mines to the Pershing yards was a movement in interstate commerce. *Philadelphia &c. R. Co. v. Hancock*, 253 U. S. 284, and cases cited.

Immediately after setting the brakes the engine was coupled to the caboose and the crew started to Chariton for dinner. The collision occurred within the Pershing yard limits. The facts bring the case fairly within those holding the employee within the provision of the act when going to or returning from his place of work. *Erie R. Co. v. Winfield*, 244 U. S. 170; *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 260; *Director General v. Bennett*, 268 F. 767; *Erie R. Co. v. Down*, 250 F. 415; *Dennison v. Payne*, 293 F. 333, where the facts are similar to those in the case at bar. The case of *Erie R. Co. v. Welsh*, 242 U. S. 303, where the work of the employe was finished and he was reporting for orders, is distinguishable. In the *Winfield* case the court said:

"In leaving the carrier's yard at the close of his day's work the [fol. 215] deceased was but discharging a duty of employment. \* \* \* Like his trip through the yard to his engine in the morning, it was a necessary incident of his day's work and partook of the character of that work as a whole, for it was no more an incident of one part than of another. His day's work was in both interstate and intrastate commerce, and so when he was leaving the yard at the time of the injury his employment was in both. That he was employed in interstate commerce is therefore plain, and that his employment also extended to intrastate commerce is for present purpose of no importance."

When the crew left Pershing for Chariton it intended returning in the afternoon to complete the unfinished work of hauling the coal cars from the mines to the Pershing yards; and if it had done so it would have moved interstate and intrastate cars as occasion required. No further orders to do the work were necessary; though to use the main line in returning to Pershing running orders from the train dispatcher would have been necessary. The crew intended taking water for the engine at Chariton. It could not be had at the mines or at Pershing. The intended return in the afternoon and the necessity of getting water at Chariton are urged by the plaintiff as facts of consequence. Facts somewhat like these were held not important in *Dennison v. Payne*, 293 F. 333, and cases are cited there in support of that view. There may be distinguishing facts in the cases cited. We do not stop to analyze or consider [fol. 216] them; but it is proper to note that the crew were intending to return and to some extent this may characterize their work at the time. *Baltimore &c. Co. v. Kast*, 299 F. 419. It was not



reporting to Chariton for orders. There was unfinished work at the mines which would have been done without further direction except for the collision.

There is another feature to which the plaintiff attaches importance. At the mines the conductor received manifests showing the destination of the cars. From Pershing he telephoned to the operator at Williamson, a few miles northerly of Pershing, the information which they contained, and the operator made bills of lading for the conductors who later picked up the cars at Pershing and continued them on their interstate or intrastate journey. It was the duty of the decedent afterward to give the manifests to the operator at Williamson or mail them to him from Chariton. Mailing seems to have been the usual way of doing. The operator checked his shipping bills with the manifests; and the manifests were then filed as a part of the company's records. Hope, on the day of the accident, telephoned as usual the information from Pershing to the operator at Williamson. The manifests were in his custody in the train-book in the caboose at the time of the collision. The fair inference is that they were burned in the fire which followed. If he had reached Chariton, the decedent, in the usual course, would have mailed them to Williamson on the evening train; and to this extent his duties as to the interstate and intrastate [fol. 217] cars hauled from the mines to the Pershing yards were unfinished at the time of his death.

The work which the deceased was doing was so much connected with interstate commerce, so much a part of it, that the question whether he was employed in interstate commerce was at the least one for the jury.

2. The question next for consideration is whether the award in the compensation proceeding is a bar. The deceased died on February 13, 1923, nine days after the collision, leaving his wife, to whom he had been married eleven weeks, and children by a former marriage. The plaintiff was appointed special administrator on February 20, 1923. Both the plaintiff and the defendant were prompt. Suit was brought on February 21, 1923. On March 2, 1923, a proceeding was instituted by the defendant before the industrial commissioner of Iowa under the compensation act against the widow. The compensation act provides that the employer, if an agreement is not reached, may apply for an arbitration. Mrs. Hope answered the defendant's petition for an arbitration alleging that the decedent was employed in interstate commerce, that the compensation act was without application and did not govern her rights, and asked that no relief be granted. She did not refer to the pending action in Minnesota, but in effect alleged that the compensation proceeding was without jurisdiction. She did not join in the appointment of arbitrators. On March 20, 1923, the arbitration committee awarded her \$15 per week for 300 weeks. The widow did not appear but appealed to the Industrial Commissioner. The commissioner, she not appearing, affirmed the arbitration committee. The widow appealed to the district court, but she did not

appear. The district court affirmed the commissioner. The answer of the defendant first interposed alleged the compensation act of Iowa and that the decedent was engaged in intrastate commerce. A supplemental answer alleged the determination by the arbitration committee and commissioner. A second supplemental answer alleged an affirmance by the district court. If the determination in the compensation proceeding is a bar to the prior action under the Employers' Liability Act the plaintiff cannot recover regardless of what his proofs show or the fact is as to the character of the decedent's employment.

The liability of the carrier for the death of an employe is "to his or her personal representative, for the benefit of the surviving widow or husband and children of such employe; and, if none, then of such employe's parents; and, if none, then of the next of kin dependent upon such employe \* \* \*," 35 St. 65; U. S. Comp. St. 1916, § 8657. The provision as to jurisdiction is as follows:

"Under this act an action may be brought in circuit [now district] court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States [fol. 219] under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States," 36 St. 291; U. S. Comp. St. 1916, § 8662.

It was the duty of the Minnesota court to proceed with the action brought by the plaintiff when its jurisdiction was invoked. It was an action which the Minnesota court had competent jurisdiction to try. In *Second Employers' Liability Cases*, 223 U. S. 1, 55, the court with emphasis stated it to be the duty of a state court, when its jurisdiction as prescribed by local law was adequate to the occasion, to proceed with the enforcement of rights accruing under the act. It has not been doubted since. See *Schendel v. McGee*, 300 F. 273, 278.

The Federal act, within the field which it covers, supersedes the common law liability, and the liability created by death by wrongful act statutes, or employers' liability acts, or compensation acts. *Seaboard Air Line Co. v. Horton*, 233 U. S. 492; *Erie R. Co. v. Winfield*, 244 U. S. 170; *N. Y. Cent. R. Co. v. Winfield*, 244 U. S. 147; *New York & Co. v. Tonsellito*, 244 U. S. 360; *Southern Pac. Ry. Co. v. Ind. Acc. Com.*, 251 U. S. 259; *Philadelphia & Co. R. Co. v. Hancock*, 253 U. S. 284. The defendant does not claim otherwise. The right of action which the Federal Employers' Liability Act gives is to be enforced in a court proceeding according to the course of the common law in the orderly investigation of facts and [fol. 220] the application of the law. That is the clear purpose of the act. Congress so intended for it designated courts of that character to administer it.

The proceeding before the industrial commissioner is not accord-

ing to the course of the common law. It is a special statutory proceeding, summary in character, and largely administrative, though involving judicial discretion and providing for a judicial review. The statute provides:

"Process and procedure under this act shall be as summary as reasonably may be. While sitting as an arbitration committee, or when conducting a hearing upon review, or in the making of any investigation or inquiry, neither the commissioner nor the arbitration committee shall be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, but may hold such arbitrations or conduct such hearings and make such investigation and inquiries in the manner best suited to ascertain the substantial rights of the parties." Supp. Code Iowa, 1923, § 2477-m24, as amended; Code Iowa, 1924, § 1441.

The industrial commissioner may review the findings of the arbitration committee. There may be an appeal from the commissioner to the district court. Upon such appeal the findings of the industrial commissioner in the absence of fraud are conclusive; but the court may set aside his order or decree if it finds that he acted in excess of his powers; or that the decree was procured by fraud; or that the facts found do not support the decree; or if there is not [fol. 221] sufficient competent evidence to warrant the decree; but upon no other ground. *Id.* 2477-m33; Code Iowa, 1924, § 1453. Reference may be had to *Hunter v. Colfax Consol. Coal Co.*, 175 Iowa, 245, where the act is considered at length, and to *Hawkins v. Bleakly*, 243 U. S. 210, where the court said that "the act prescribes the measure of compensation and the circumstances under which it is to be made, and establishes administrative machinery for applying the statutory measure to the facts of each particular case; provides a hearing before an administrative tribunal and for judicial review upon all fundamental and jurisdictional questions."

The claim of the defendant is that the finding that the decedent was engaged in intrastate commerce, necessary to an award in the compensation proceeding, and expressly made, binds the personal representative of the deceased, proceeding under the Federal act in an earlier commenced action. It does not claim that the award is res adjudicata in the broad sense, but that it is an estoppel upon the question of the character of the deceased's employment. If this view be the correct one the question whether courts of common law jurisdiction, designated by Congress, shall determine the employee's rights in a common law proceeding, or whether they shall be determined by compensation boards proceeding summarily, may depend upon which moves with the greater celerity; and in the ordinary case it is the compensation board. It is illustrated here. The award was made within 18 days after the commencement of the proceeding, [fol. 222] and in 90 days after the commencement of the proceeding the award was affirmed by the court. It was a year after its commencement before the action based on the Federal right was called for trial.

The defendant relies and rightly enough upon *Williams v. South-*

ern Pac. Ry. Co., 54 Cal. App. 571, a carefully considered case. There the plaintiff, who was the beneficiary, brought an action as administratrix of her husband to recover under the federal act. Later, just prior to the expiration of the statutory limitation fixed by the compensation act, and to save her right if she failed in her action under the Federal act, she applied in her individual capacity for an adjustment under the compensation act. She asked that the proceeding be held in abeyance, but the commission proceeded with it, made her an award, the award was pleaded as *res adjudicata*, and was held to be so. The result was harsh. It seems that something is wrong in the law or its administration, if one claiming and enforcing a cause of action under the Federal act, the character of the employment as interstate determining his right, and the character of his employment being uncertain as a question of law, or for the jury as a question of fact, must lose it if he seeks to protect himself in a less valuable right under the compensation act. See *Corbett v. Boston & Maine R. Co.*, 219 Mass. 351. This is not quite the case here, for the beneficiary fought against instead of for the application of the compensation act. It is harder here than in the California [fol. 223] case, assuming that the beneficiary had a right under the Federal act, as found by a tribunal designated by Congress to try the question, if she must take against her will a per week award for 300 weeks, the aggregate of which is but a fraction of what she would have under the verdict of the jury, and the yearly amount of which is less than a low rate of annual interest upon her actual damage. Such a result does not change the law, but it prompts the inquiry whether it is the necessary or intended result. From the facts surrounding the accident, and with causal negligence admitted as here, there arose one cause of action. It was under the Federal act or the Iowa compensation act. Of course the facts making it the one or the other are different; but the determining single question was whether the decedent was employed in interstate commerce.

The question presents some difficulty. The defendant forcefully argues that the beneficiary had her remedy as defendant in the compensation proceeding; that if it was there found that the deceased was engaged in intrastate commerce, as it was found, the award and nothing else was her right; that if it had been found that he was not engaged in intrastate commerce she was left to the result of the action brought by the administrator; and that the finding in the compensation proceeding is rightly a bar. The argument is plausible. It may be sound. No case precisely in point is found, for in the California case the beneficiary took her case to the industrial board, [fol. 224] as did the beneficiary in *Dennison v. Payne*, 293 F. 333, 342, where it was assumed that the finding in the compensation proceeding might be a bar, but not directly so held, for the decision was placed upon another ground. Here the beneficiary did not invoke the aid of the compensation board, protested that her husband met his death while employed in interstate commerce, that her rights were not controlled by the compensation law, and participated in the proceeding only formally.

Without authority controlling or certainly guiding us, we are con-

tent to hold that the substantive right given the employe or his representative by Congress under express constitutional grant, with the courts to which he may go for its enforcement pointed out to him, is a superior substantive right; and that when he or his representative has chosen the forum to which to submit his cause, he cannot, against his objection and upon the initiative of his employer, be required to submit it in a summary proceeding commenced later under a compensation act.

If the action had been brought in a Federal district court in Iowa, as with great propriety it might have been, we cannot think that the Federal court would have permitted the defendant to assert as a bar against the plaintiff an award to the beneficiary in the later compensation proceeding, made against the protest of the beneficiary that her rights were determinable in the pending action. The result should be the same if the action were brought in a Federal court [fol. 225] in Minnesota as it might have been or in a state district court of Iowa, where it might have been brought with greater convenience than in Minnesota. And it should be the same when brought in a state court of Minnesota designated by Congress as a proper court. It may be that the widow did not in her private capacity do what she could have done to protect herself. It may be that the plaintiff, anticipating the plea of a bar, might have done something more than he did. It may be that the well understood rule, recently discussed in *Kline v. Burke Cons. Co.*, 260 U. S. 226, that when two actions, both in personam, are pending, jurisdiction in one is not affected by the other, does not apply in full where there is one action proceeding according to the course of the common law to enforce a right given by Congress and another, proceeding summarily, under a statute to enforce a right given by a state compensation act. The widow was the only party in the compensation proceeding. The other beneficiaries are foregotten in that proceeding and in the action under the Federal act. The plaintiff was not a party to the compensation proceeding. And this brings us to the question whether there is such identity of parties as to enable the defendant to invoke an estoppel.

3. It is the contention of the plaintiff that though the fact of the character of employment found in the compensation proceeding might in a particular case be an estoppel in a subsequent action, there can be no estoppel here because of lack of identity of the parties.

[fol. 226] The right of recovery under the employers' liability act is in the personal representative, not in the beneficiaries. The award under the compensation act is to the beneficiaries. The personal representative of the decedent does not participate. The beneficiaries cannot sue under the federal act. *American Railroad Co. v. Birch*, 224 U. S. 547; *Missouri & Co. v. Wulf*, 226 U. S. 570; *St. Louis & Co. v. Seale*, 229 U. S. 156. If the holding by the circuit court of appeals in *Dennison v. Payne*, 293 F. 333, 342, is correct, and it is the only federal authority directly in point, it should be held that there was a lack of identity of parties and therefore no estoppel. There the beneficiary, who as administratrix was plaintiff in an ac-

tion under the Federal act to recover for the decedent's death, petitioned for an award under the compensation act, but stated that it was done to avoid the possible bar of the statute of limitations. Nevertheless the proceeding continued and an award was made to the beneficiary. The court relied upon the principle of *Troxell v. Delaware &c. Co.*, 227 U. S. 434, where the circumstances were different; but the rule as to the necessity of identity of parties was stated there. In reaching its conclusion the court of appeals said:

"In the present suit there was not identity of parties, and that is sufficient to make the doctrine of *res judicata* inapplicable. As in our opinion the plaintiff's intestate was engaged in interstate commerce at the time of his death, and as the proceedings before the Pennsylvania state board were not between the same parties, they [fol. 227] therefore cannot estop the plaintiff from maintaining the present suit."

We follow the federal authority and hold that there was not the requisite identity of parties.

4. The plaintiff is special administrator. The federal statute puts the cause of action in the personal representative. Our holdings are that a like action under our death by wrongful act statute, or under statutes of other states, may be maintained by a special administrator. *Jones v. Minn. T. Co.*, 108 Minn. 129; *Castigliano v. Great N. Ry. Co.*, 129 Minn. 279; *State v. Probate Court*, 149 Minn. 466. The personal representative is but a trustee for the purpose of recovering for designated beneficiaries. The practice has been frequent both in the state and federal courts to bring the action in the name of a special administrator and we abide by our former holdings.

5. The verdict was for \$26,047.50. The defendant urges that it is excessive. The deceased was 49 years old. His life expectancy was between 21 and 22 years. He had been married to his present wife eleven weeks. He contributed from \$135 to \$150 a month to her. His earnings were considerably greater. He had children by a former wife, but as to them the record gives us no information. He was badly burned. The testimony of his nurse is that he was unconscious all of the 9 days that he lived. The testimony of the widow is that he was at times conscious, spoke rationally, and suffered [fol. 228] greatly. With the evidence so it was proper to award damages for conscious pain and suffering. We do not allow a substantial award for pain and suffering unless there is substantial evidence of it, nor is a jury permitted to make an emotional award through sympathy for suffering. *Fries v. Chicago, R. I. & P. Ry. Co.*, 198 N. W. 998. How much of the verdict was for pain and suffering the record does not show. The amount of it is fairly sustained. *Clark v. Davis*, 153 Minn. 143; *Schendel v. Chicago &c. Co.*, 198 N. W. 450.

It may be noted that if subsequent events make it desirable the trial court, having charge of the distribution of the fund, can re-

quire the discharge of liability upon the compensation award so that the defendant will not be inconvenienced thereby.

Judgment affirmed.

Mr. Justice Stone took no part.

[fol. 229]

IN SUPREME COURT OF MINNESOTA

[Title omitted]

PETITION FOR STAY

The above named appellant, feeling itself aggrieved by the order for judgment of this Court herein, by which this Court did order judgment affirming in all things the judgment of the Court below, and desiring to petition the Supreme Court of the United States for a writ of certiorari to review the final judgment of this Court, when entered, does hereby pray that the Court do enter its order staying all proceedings herein and during the pendency of such petition for a writ of certiorari to said United States Supreme Court.

The Chicago, Rock Island & Pacific Railway Company, by  
O'Brien, Horn & Stringer, Its Attorneys.

[fol. 230]

IN SUPREME COURT OF MINNESOTA

ORDER OF STAY—June 22, 1925

Upon application of the above named appellant:

It Is Ordered, that upon and after the entry of final judgment herein affirming the judgment of the Court below, all proceedings herein in this court and in the District Court of Steele county, Minnesota, including the issuance of any writ of execution out of either court and the issuance of any remittitur from this court to the court below, be and hereby are in all things stayed pending the petition of the appellant for a writ of certiorari to the United States Supreme Court.

Homer B. Dibell, Justice.

[fol. 231]

IN SUPREME COURT OF MINNESOTA

[Title omitted]

JUDGMENT—June 30, 1925

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of

the Court below, herein appealed from, to-wit: of the District Court within and for the County of Steele, be and the same hereby is in all things affirmed.

And it is further determined and adjudged that respondent herein, do have and recover of appellant herein the sum and amount of eighty-two and 50/100 dollars (\$82.50) costs and disbursements in this cause in this court, and that execution may be issued for the enforcement thereof.

Dated and signed June 30th, A. D. 1925.

By the Court:

Attest:

Grace F. Kaercher, Clerk.

#### Statement for Judgment

Statutory costs, \$25.00; printer, \$57.50; total, \$82.50.

[fol. 232] IN SUPREME COURT OF MINNESOTA

[Title omitted]

#### CLERK'S CERTIFICATE

I, Grace F. Kaercher, Clerk of the Supreme Court of the State of Minnesota, do hereby certify that the foregoing, consisting of 231 numbered pages, is a true and complete transcript of the record in the above cause on appeal to this court, comprising the record on appeal from the District Court of the Fifth Judicial District in and for the Steele county, Minnesota, to this court, together with all proceedings in said cause in this court, including the opinion of the court thereon and the final judgment of this court on said appeal.

In Witness Whereof I have hereunto set my hand and affixed the seal of this court, this 27 day of July, 1925.

Grace F. Kaercher, Clerk of the Supreme Court of the State of Minnesota. (Seal of the Supreme Court, State of Minnesota.)

[fol. 233] IN SUPREME COURT OF THE UNITED STATES

#### ORDER ALLOWING CERTIORARI—Filed October 19, 1925

The petition herein for a writ of certiorari to the Supreme Court of the State of Minnesota is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.



**No. 684**

AUG 17 1925

WM. R. STANSBURY  
CLERK

IN THE  
**UNITED STATES SUPREME COURT**

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CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COM-  
PANY,

*Petitioner,*

vs.

FRED A. ELDER,

*Respondent.*

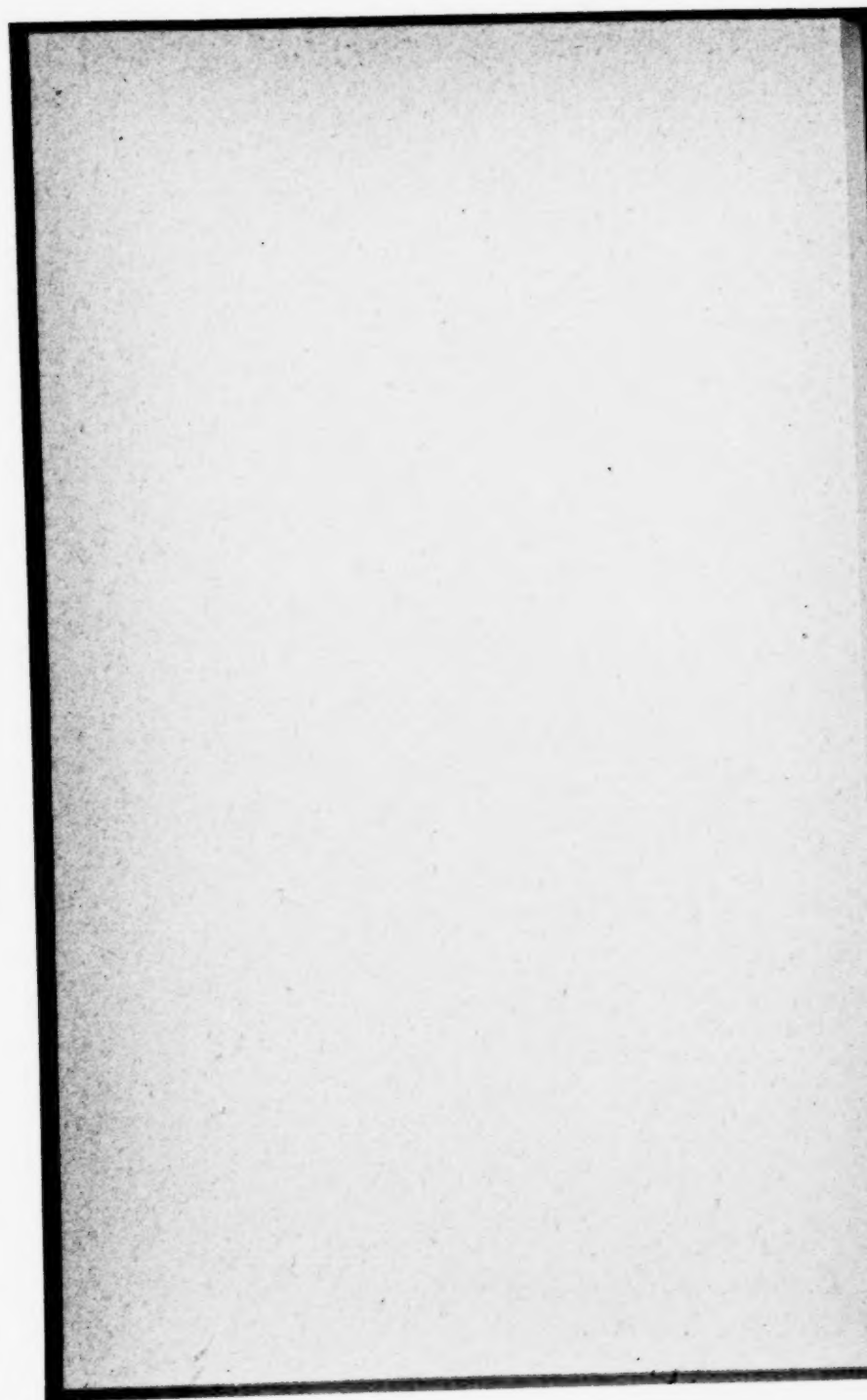
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BRIEF IN SUPPORT OF PETITION FOR  
WRIT OF CERTIORARI.

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M. L. BELL,  
New York, New York,  
W. F. DICKINSON,  
DANIEL TAYLOR,  
Chicago, Illinois,  
THOMAS D. O'BRIEN,  
EDWARD S. STRINGER,  
St. Paul, Minnesota,  
Counsel for Petitioner.

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IN THE  
**UNITED STATES SUPREME COURT**

---

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COM-  
PANY,

*Petitioner,*

vs.

FRED A. ELDER,

*Respondent.*

---

BRIEF IN SUPPORT OF PETITION FOR  
WRIT OF CERTIORARI.

---

B.

The opinion of the court below, the Supreme Court of Minnesota, is reported in *Elder v. Chicago, R. I. & P. Ry. Co.*, 204 N. W. 557. It is not yet reported in the official Minnesota Reports.

C.

1. The date of the judgment sought to be reviewed is June 30, 1925. (Record 254.)

2. The specific claims advanced and rulings made which are relied upon as the basis of this court's jurisdiction are:

Petitioner claimed both in the District Court of Steele County, Minnesota, and in the Supreme Court of Minnesota, that a certain judgment of the Iowa Industrial Commissioner, was *res judicata*, and a bar to plaintiff's cause of action, under the full faith and credit clause of the Constitution of the United States, Section 1, Article IV. This claim of your petitioner was determined both by the District Court of Steele County, Minnesota, and by the Supreme Court of Minnesota against your petitioner. Petitioner especially set up and claimed a right under the Constitution of the United States, and the right so expressly set up and claimed was denied by the Supreme Court of the State of Minnesota. (R. 12, 126, 127, 128, 129, 231, 233, 234, 236, 237, 246, 247, 250, 251.)

3. The jurisdiction of this court is invoked in this cause, under Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, "An act to amend the Judicial Code, and to further define jurisdiction of the Circuit Courts of Appeal, and of the Supreme Court, and for other purposes."

4. The jurisdiction of this court is sustained by the following:

*Forsyth v. Hammond*, 166 U. S. 506, Subsection (a), Section 5, Rule 35, of Revised Rules, effective July 1, 1925.

## D.

## STATEMENT OF THE CASE.

This case, and its companion case, *Chicago, R. I. & P. Ry. Co.*, Petitioner, v. *A. D. Schendel*, as administrator, Respondent, in which case an application for a writ of certiorari is likewise filed in this court, grew out of the same accident. The two cases, while differing in some respects, have many points in common. The two cases should be considered together.

Plaintiff-respondent was injured in a wreck near Pershing, Iowa, (within the state of Iowa), on February 4, 1923. Negligence is conceded. The question at issue was whether he was engaged in interstate commerce so that the remedy was under the Federal Employers' Liability Act of April 22, 1908, or in intrastate commerce, so that the remedy was under the Workmen's Compensation Act of Iowa. (R. 142-192.) A summary of its provisions is found in *Hunter v. Colfax Consolidated Coal Co.*, 175 Ia. 245, 154 N. W. 1037, and in *Hawkins v. Bleakly*, 243 U. S. 210, and in the opinion of the court below in the companion case of *Schendel v. C. R. I. & P. Ry. Co.*. Petitioner contends that a certain unreversed judgment of the Iowa Industrial Commissioner, entered on Feb. 13, 1924, conclusively determined the commerce to be intrastate. It reads in part as follows:

3. That at the time of the injury in question the said Fred Elder was not engaged in interstate commerce so as to prohibit cover-



age by the Iowa Workmans Compensation Law.

4. That the case is subject to adjustment under the Iowa Workmen's Compensation Law. (R. 220.)

Eliminating entirely for the present this Iowa judgment, and viewing the facts as shown by the record most favorably to plaintiff, at most it made a question of fact as to whether decedent was engaged in interstate commerce. Petitioner contended in the court below, and still contends, that (even without the Iowa judgment) decedent was engaged in intrastate commerce as a matter of law. But for the purpose of argument only, we will concede an issue of fact.

Petitioner contends that under the full faith and credit clause of the Constitution of the United States, this judgment concluded the entire matter, and the denial of petitioner's claim in this respect constitutes the basis of this court's jurisdiction.

Plaintiff (respondent) began an action under the Federal Employers' Liability Act, in the District Court of Steele County, Minnesota, on Oct. 30, 1923 (R. 2). On Jan. 5, 1924, petitioner began a proceeding before the Industrial Commissioner of Iowa, under and pursuant to the Iowa Workmen's Compensation Act (R. 196).

Elder answered asserting that he was engaged in interstate commerce and hence that the Iowa Compensation Act was without application (R. 199-205). The arbitration committee provided for

by the Iowa Compensation Act was waived by the parties and the matter submitted to the Deputy Industrial Commissioner (R. 217) who found that Elder was engaged in intrastate commerce (R. 220). Elder filed an application in review, (R. 222), which was not acted upon at the time of trial although the Industrial Commissioner afterwards affirmed the judgment of the Deputy Industrial Commissioner.

In the action in the Steele County District Court, the judgment of the Industrial Commissioner was pleaded as *res adjudicata*, and as a bar under the full faith and credit clause of the United States Constitution (R. 10-12-17). The action was tried on March 1 to 3, 1924, resulting in a verdict for the plaintiff, and necessarily a finding by the jury that the plaintiff-respondent was engaged in interstate commerce, which was the only question submitted to it (R. 15, 130-137, 229).

Petitioner offered in evidence a copy of the Iowa judgment, including all proceedings leading up to it, duly exemplified under the Federal Constitution (R. 126, 192-227). Upon objection, ruling was deferred, until a ruling upon petitioner's motion for a directed verdict (R. 127). Such motion by petitioner for a directed verdict was thereafter made upon the strength of the Iowa judgment (R. 127-128), and denied by the court (R. 129), and the Iowa judgment excluded from the evidence (R. 129). After the verdict, the court denied a motion for judgment notwithstanding the verdict,

or for a new trial on the same ground (R. 230-237). From a judgment entered on the verdict (R. 238), petitioner appealed to the Supreme Court of Minnesota (R. 239), urging the same ground of reversal (R. 246-247). The Supreme Court filed its opinion and order for judgment on June 19, 1925, in all things sustaining the lower court (R. 249 to 251), and on June 30, 1925, final judgment of affirmance was entered in the Supreme Court (R. 254).

The Federal question, the denial of petitioner's right under the full faith and credit clause of the Constitution, was squarely raised at the following stages of the proceedings:

1. Supplemental answer (R. 10).
2. Offer of the Iowa judgment in evidence (R. 126).
3. Motion for a directed verdict (R. 127).
4. Motion for judgment notwithstanding the verdict, or a new trial, (R. 230-233, particularly folios 691-692).
5. In the Supreme Court upon appeal from the judgment (R. 246-247).

## E.

## ASSIGNMENTS OF ERROR.

The Supreme Court of the State of Minnesota erred:

1. In refusing to give full faith and credit to the final judgment of the Iowa Industrial Commissioner, contrary to Section 1, of Article IV, of the Constitution of the United States.

2. In entering final judgment affirming the District Court of Steele County, Minnesota, in refusing to give full faith and credit to the final judgment of the Iowa Industrial Commissioner, contrary to Section 1, of Article IV, of the Constitution of the United States.

3. In entering judgment affirming the District Court of Steele County, Minnesota, in:

a. Refusing to receive in evidence the exemplified copy of the Iowa judgment.

b. Refusing to direct a verdict for the defendant (petitioner) because of said Iowa judgment.

c. Refusing to grant judgment for the defendant (petitioner) notwithstanding the verdict of the jury against it, because of said Iowa judgment.

d. Refusing to grant a new trial because of said Iowa judgment.

e. Entering judgment in favor of plaintiff (respondent) and against defendant (petitioner) contrary to said Iowa judgment.

## F.

## ARGUMENT.

The Supreme Court of Minnesota in its opinion holds that the judgment of the Iowa Industrial Commissioner was not entitled to full faith and credit under the Federal Constitution, because:

The Iowa judgment was not binding for the reason that:

“Without authority controlling or certainly guiding us, we are content to hold that the substantive right given the employe or his representative by Congress under express constitutional grant, with the courts to which he may go for its enforcement pointed out to him, is a superior substantive right; and that when he or his representative has chosen the forum to which to submit his cause, he cannot, against his objection and upon the initiative of his employer, be required to submit it in a summary proceeding commenced later under a compensation act.”

This quotation is from the Schendel case but the decision in that case was the basis of the decision in this case (R. 250-251).

## I.

## BINDING EFFECT OF THE IOWA JUDGMENT.

The court's conclusion is

(a) Manifestly wrong; but

(b) Even if right, as an abstract proposition of law, does not support the conclusion reached because it only goes to the correctness of the Iowa court's decision and not its jurisdiction.

(a)

It should be unnecessary to cite authorities for the familiar rule that where a fact is once established by a judgment of a tribunal of competent jurisdiction, it cannot be litigated in another action.

*Southern Pacific Ry. v. United States*, 168 U. S. 1.

While possibly the Iowa judgment is not res adjudicata in its broad sense in this action, it is certainly an estoppel by verdict in that it squarely determined the character of the commerce, and that determination is conclusive in this action.

*Sheets v. Ramer*, 125 Minn. 98, 145 N. W. 787.

*Meyers v. International Co.*, 263 U. S. 64.

*Cromwell v. Sac County*, 94 U. S. 351.

As we read the opinion of the court below, it recognizes this rule, but holds that since there was an assertion of a cause of action under the Federal Employers' Liability Act, the Iowa tribunal was

immediately divested of its right to determine whether there was a cause of action under its own laws. A moment's reflection will clearly demonstrate the fallacy of the court's reasoning.

Absolutely no authority is cited to support the court's conclusion. THE ONLY TWO AUTHORITIES IN THE COUNTRY SQUARELY IN POINT, HOLD CONTRARY TO THE CONCLUSION REACHED BELOW. *Williams v. Southern Pacific*, 202 Pac. 356, 54 Cal. App. 571, (certiorari denied, 258 U. S. 622) holds squarely that such a judgment in a compensation proceeding is conclusive in an action brought under the Federal Act. It is absolutely impossible to distinguish the *Williams* case from the case at bar, although the court below attempts a fanciful distinction. Likewise, the case of *Dennison v. Payne*, 293 Fed. 333 (Circuit Court of Appeals, of the Second Circuit), while differing with the California court in the *Williams* case on another phase, holds squarely that the judgment in the compensation case is binding in the action under the Federal act.

There are involved two sovereign powers, the State of Iowa, and the United States. Each is supreme in its own sphere, the State as to intrastate commerce, the United States as to interstate commerce. The United States cannot by legislation, regulate or interfere with the conduct of intrastate commerce, or add to or subtract from any substantive right given by the state law, except as may be necessary for the protection of interstate commerce.

A state may neither regulate nor interfere with interstate commerce, nor can the state by legislation, add to or subtract from any substantive right given by Congress. In that field, the Federal law is supreme.

*Seaboard Air Line v. Horton*, 233 U. S. 492.

*Eric Ry. v. Winfield*, 244 U. S. 170.

*N. Y. Central Ry. v. Winfield*, 244 U. S. 147.

*N. C. Central Ry. v. Tonsellito*, 244 U. S. 360.

The state of Iowa has legislated as to the remedy to be given for an injury occurring in intrastate commerce, and has created a tribunal for enforcing such remedy. That tribunal is the Industrial Commissioner, subject to review by the courts. He has, under the specific terms of the act creating his office, jurisdiction only in cases occurring in intrastate commerce.

The United States has, by the Federal Employers' Liability Act, legislated as to the remedy for an injury occurring in interstate commerce, and while not creating a new tribunal for the enforcement of rights under that act, in effect it has done so by utilizing the courts of the state and Federal government already in existence. These tribunals have jurisdiction (as to accidents occurring in Iowa) only of accidents in interstate commerce.

In order that either tribunal may exercise jurisdiction it must find the jurisdictional facts. It necessarily has authority to determine whether it has jurisdiction.



The Iowa tribunal therefore has jurisdiction to determine whether the commerce is interstate or intrastate. A finding of interstate commerce ousts it of jurisdiction.

Conversely (as to Iowa accidents), the tribunals for enforcing the Federal act likewise have authority to determine whether they have jurisdiction, and consequently authority to determine the character of the commerce. A finding of intrastate commerce ousts them of jurisdiction.

We have therefore, a situation where both tribunals have authority to determine the facts upon which their respective jurisdictions depend. The first final judgment entered, no matter in which tribunal, determines the matter for all times. It makes no difference which proceeding or action was started first. It is not the final judgment in the first suit that governs, but the first final judgment, although it may be in the second suit.

*Boatman's Bank v. Fritzlen*, 135 Fed. 650.

*Allis v. Davidson*, 23 Minn. 442.

*Insurance Co. v. Harris*, 97 U. S. 331.

*Schuler v. Israel*, 120 U. S. 506.

See also the authorities cited in:

*Williams v. Southern Pacific Ry.*, 202 Pac. 356, 54 Cal. App. 571.

Had the court below determined that the deceased was engaged in interstate commerce before the Iowa court found to the contrary, that finding, until set aside, would have been binding on the

Iowa tribunal in any proceeding brought under the Iowa Compensation Act.

*Jackson v. Industrial Board*, 280 Ill. 526, 117 N. E. 705.

Since however the Iowa tribunal determined the character of the commerce to be intrastate before the question came up for determination in Minnesota, the Iowa judgment was conclusive upon the Minnesota courts.

The court below ignored the Iowa judgment because the jury below disagreed with the Iowa tribunal on an issue of fact. The court below takes the position that since interstate commerce was asserted, the court in which it was asserted was the only tribunal that could determine whether it existed. Stating it another way, it held that the Iowa tribunal could not determine its own jurisdiction. Merely to state the proposition is to demonstrate its unsoundness.

(b)

Even if, as an abstract proposition, the conclusion of the court below is sound, it does not involve the jurisdiction of the Iowa tribunal, but only the correctness of its decision.

The court below holds that a party who has commenced an action claiming under the Federal Act, *cannot be required* to litigate the interstate commerce question before the Industrial Commissioner. The barrier which the court below does not attempt to, and of course could not get over,

is that the Iowa tribunal in this particular case determined that he *could be required* to do exactly this.

If the court below is right, it merely means that the Iowa Commissioner was wrong in the conclusion he had reached. If the Iowa Commissioner was wrong, the way to correct the error was to appeal and not by a collateral attack upon his judgment.

Thus in 23 Cyc. 1088, it is stated:

"Where the court judicially considers and adjudicates the question of its jurisdiction and decides that the facts exist which are necessary to give it jurisdiction of the case, *the finding is conclusive and cannot be controverted in a collateral proceeding.*"

See also

34 Corpus Juris, 552 and cases cited.

In *Taylor v. Robert Ramsey Co.*, 114 Atl. 830, the Supreme Court of Maryland held that the jurisdiction of the State Industrial Commission to make an award under the Compensation Act, was not open to collateral attack. The Industrial Commission had awarded compensation to a man engaged in a maritime occupation. This court thereafter in another case held that a state could not include men employed in maritime occupations within its compensation act.

*Southern Pac. Co. v. Jensen*, 244 U. S. 205.

Therefore though the Industrial Commission was clearly wrong, nevertheless it was held that the award under the compensation act was valid.

The only way to correct an error in the conclusion of the Iowa Commissioner, is by direct appeal.

*Toy Toy v. Hopkins*, 212 U. S. 542,

where this court held (syllabus) :

“Even though the Circuit Court erroneously retains jurisdiction of a criminal case against an allottee Indian, *its judgment is not void but should be corrected on appeal or by writ of error and cannot be attacked in habeas corpus proceedings.*”

Likewise in the case of *Dowell v. Applegate*, 152 U. S. 327, this court said, on page 340 :

“These authorities above cited, it is said, do not meet the present case, because the ground on which it is claimed the Federal Court assumed jurisdiction was insufficient in law to make this case one arising under the laws of the United States. But that was a question which the Circuit Court of the United States was competent to determine in the first instance. Its determination of it was the exercise of jurisdiction. *Even if that court erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it, and could not be questioned by them or either of them collaterally, or otherwise than on writ of error or appeal to this court.*”

## II.

THE DECISION OF THE INDUSTRIAL COMMISSIONER IS A JUDGMENT WITHIN THE MEANING OF THE CONSTITUTION.

While the court below did not consider the proposition, evidently deeming it to be without merit, it was strenuously contended by respondent in the court below that the decision of the Industrial Commissioner was not a judgment within the meaning of the full faith and credit clause of the Constitution.

In *Hunter v. Colfax Consolidated Coal Co.*, 175 Ia. 245, 154 N. W. 1037, the Supreme Court of Iowa construed the Iowa Compensation Act, holding that the Industrial Commissioner was acting judicially in adjudicating cases arising under the Compensation Act.

That the decision of the Industrial Commissioner is res adjudicata, and hence a judgment entitled to full faith and credit, see the following decisions:

*Williams v. Southern Pac. Ry. Co.*, supra.

*Dennison v. Payne*, supra.

*In re Hunnewell (Mass.)*, 107 N. E. 934.

*Centralia Coal Co. v. Industrial Commission*,  
297 Ill. 451, 130 N. E. 727.

*Taylor v. Robert Ramsey Co.*, supra.

*Lumbermans Mut. Casualty Co. v. Bissell*  
(Mich.), 190 N. W. 283.

*Jackson v. Industrial Board*, supra.

*Hibben v. Smith, (Ind.)*, 62 N. E. 447.

*McMahon v. Pithan (Ia.)*, 147 N. W. 920.

*State of Nebraska v. Houston*, 94 Neb. 445,  
50 L. R. A. (N. S.) 227.

*New York Centl. v. General Electric Co.*, 146  
N. Y. Sup. 322, 83 Misc. Rep. 529.

This case was reversed by the Appellate Division of the Supreme Court in 153 N. Y. Sup. 478, but the decision of the Appellate Division was again reversed by the Court of Appeals in 114 N. E. 115.

*Coen v. James*, 150 N. Y. Sup. 202.

*State v. Hynes*, 82 Minn. 34, 84 N. W. 636.

*State v. Dunn*, 86 Minn. 301, 90 N. W. 772.

*Minnesota Sugar Co. v. Iverson*, 91 Minn. 30,  
97 N. W. 454.

The court below was clearly wrong in the determination of a Federal question arising under the Constitution of the United States. A writ of certiorari should be granted to correct its judgment.

Respectfully submitted.

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**No.684**

FILED

JUL 28 1925

WM. R. STANSBURY  
CLERK

**IN THE  
Supreme Court of the United States.**

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CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COM-  
PANY,

*Petitioner,*

vs.

FRED A. ELDER,

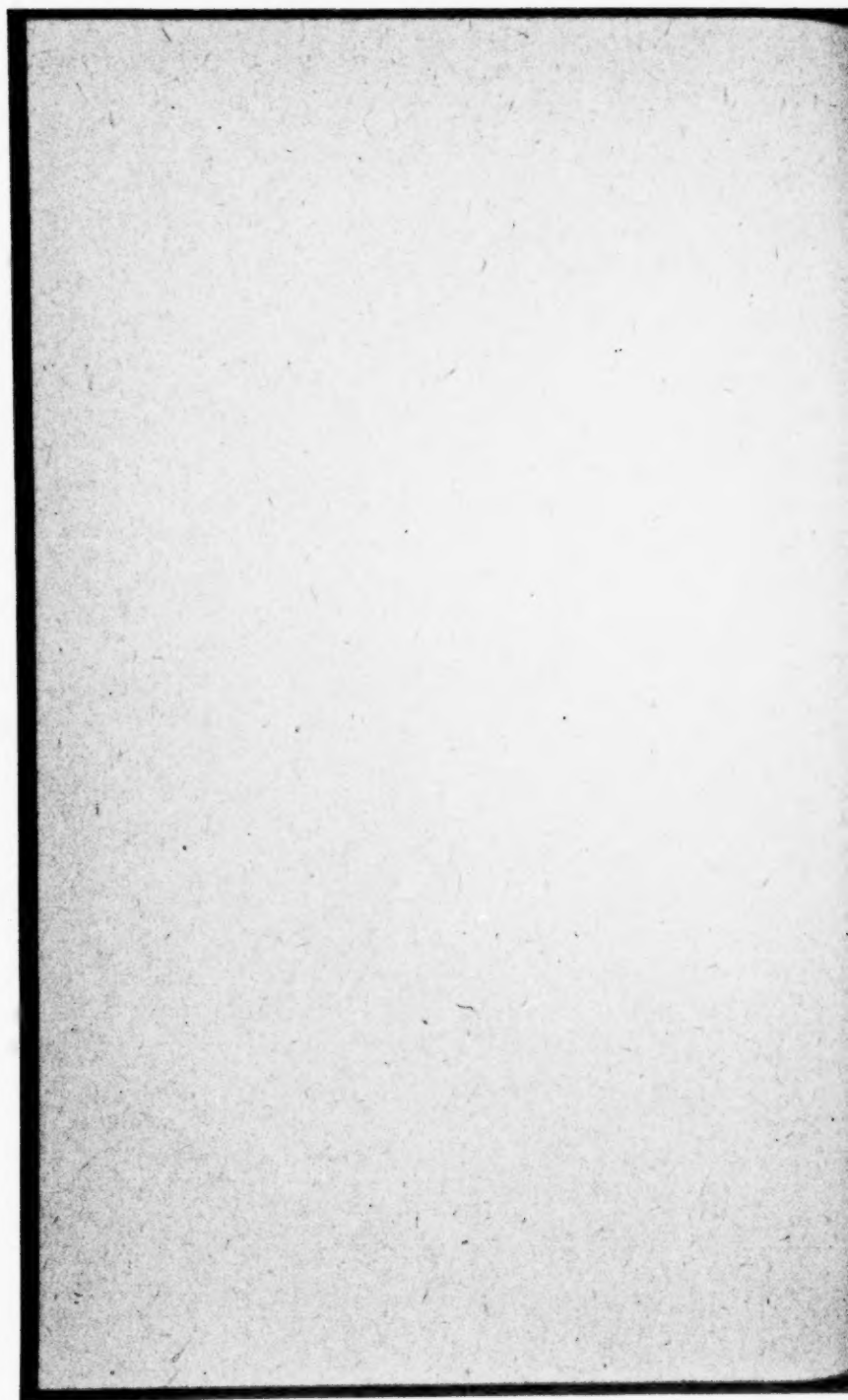
*Respondent.*

---

**BRIEF IN OPPOSITION TO GRANTING OF WRIT  
OF CERTIORARI.**

---

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**IN THE**  
**Supreme Court of the United States.**

---

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COM-  
PANY, *Petitioner,*

*vs.*

FRED A. ELDER,  
*Respondent.*

---

**BRIEF IN OPPOSITION TO GRANTING OF WRIT  
OF CERTIORARI.**

---

**STATEMENT OF THE CASE.**

This action was tried before the court and a jury in the District Court of Steele County, Minnesota. There was a verdict for the plaintiff.

Subsequently judgment was entered on the verdict and defendant, the petitioner here, appealed to the Supreme Court of Minnesota.

The Supreme Court of Minnesota affirmed the judgment of the District Court.

It is to review this judgment that the writ of certiorari herein is sought.

The action is founded on the Federal Employers' Liability Law.

### STATEMENT OF FACTS.

Elder, the respondent, while employed as a railway freight brakeman by petitioner, was injured, due to petitioner's negligence.

At the trial, petitioner conceded that it was negligent and that such negligence was the proximate cause of respondent's injuries.

### PETITIONER'S CONTENTION.

Generally stated, the contention of petitioner is that an adjudication by the Deputy Industrial Commissioner of the State of Iowa, which was reached before the verdict in this case, constituted a "judgment," and that this "judgment" constituted a bar to respondent's right to maintain the action under the Federal Law in the State of Minnesota.

It is claimed that the Deputy Industrial Commissioner found as a fact that respondent was engaged in intrastate commerce and that because of this finding, the action under the Federal statute could not be maintained in the District Court of Steele County, Minnesota.

### FACTS RELATIVE TO THE FINDING (CALLED A "JUDGMENT" BY PETITIONER) OF THE DEPUTY INDUSTRIAL COMMISSIONER OF IOWA.

Elder was injured in the State of Iowa. After his injury, on *October 30th, 1923*, he commenced an action in the District Court of Steele County, Min-

nesota, to recover damages under the Federal Employers' Liability Law.

Defendant answered on November 19th, and pleaded the defenses of assumption of risk, contributory negligence, and also that the action was governed by the Compensation Law of Iowa.

In the original answer there was no claim of any proceeding before the Industrial Commission of Iowa in an attempt to evade the Federal statute.

The plaintiff interposed a reply on November 19th, 1923.

*About three and one-half months later, while the action was pending in the District Court of Steele County, and on February 19th, 1924, the defendant filed a supplemental answer, setting forth the claim that Elder had been served with notice to appear before the Compensation Board of Iowa and that an award had been made in his "favor" by the Compensation Board.*

*Elder did not ask for compensation under the Iowa act.* Under that act either party may initiate proceedings. The railway company initiated proceedings before the Iowa Industrial Commission.

On the 13th day of February, 1924, the Deputy Industrial Commissioner of Iowa made an order awarding compensation to Elder.

On the first day of March, 1924, the case came on for trial in the District Court of Steele County, Minnesota.

**THERE WAS NO JUDGMENT EVER ENTERED OR RENDERED IN IOWA AFFECTING RESPONDENT.**

The only adjudication in Iowa was the *order or award* of the Deputy Industrial Commissioner of that state.

*After the verdict* in the present case, and on March 5th, 1924, the order of the Deputy Industrial Commissioner was reviewed and affirmed by the Industrial Commissioner of Iowa.

This later order, made after the trial, has no bearing on the case.

#### INTERSTATE COMMERCE.

Elder was engaged in interstate commerce under the *undisputed facts* shown at the trial. His last work before being injured was to set the brakes on two interstate cars. He then accompanied an engine onto one of defendant's main line tracks to get water and dinner, intending to return to complete his work about the interstate cars.

On the question of interstate commerce the petitioner, on page 4 of its brief, says:

*"For the purpose of argument only, we will concede an issue of fact."*

The trial court submitted the question of interstate commerce as a fact question to the jury.

The Supreme Court of Minnesota held the work to be interstate.

We have, therefore, a situation where it appears that plaintiff in the court below was actually, and concededly, engaged in interstate commerce at the time he received his injuries. He commenced his action in the District Court under the Federal

statute. *After he commenced the action*, the railway company attempted to prevent the exercise of his Federal right by making application to the Iowa Industrial Commission, seeking to have him awarded compensation under the Iowa Compensation Act.

The Deputy Industrial Commissioner found for the railway company and awarded respondent compensation under the Iowa Act.

There was *no judgment* entered, and there was *only an award* of the Deputy Commissioner. This was pleaded as a bar, it being claimed at first that it was a "judgment," and, secondly, that if not a "judgment," that it was an adjudication of the fact of intrastate commerce.

The Deputy Industrial Commissioner of Iowa found as a fact that Elder's work was intrastate.

The District Court of Minnesota and the Supreme Court of Minnesota found as a fact that the work was interstate.

#### THE QUESTION FOR THIS COURT.

Can the Iowa Industrial Commission, by an *award* of its Deputy Commissioner, *defeat a right of action of an employee under the Employers' Liability Act?*

The above is the question for determination by this court.

It is to be borne in mind that the plaintiff, below, started his action under the Employers' Liability

*Act before any proceedings were started under the Compensation Act.*

#### RESPONDENT'S CONTENTION.

Respondent contends that a writ of certiorari should not be granted because:

1. There was *no judgment* in the State of Iowa, the *order or award* of the Deputy Industrial Commissioner not being a judgment.

2. The law of the United States is supreme and *after* an action is commenced under the Employers' Liability Law the right to maintain it *cannot be defeated by subsequently commenced proceedings before the Iowa Industrial Commission.*

3. Respondent was, as a fact and as a matter of law, as disclosed by the record, engaged in interstate commerce at the time he was injured.

4. That the writ of certiorari herein is sought solely for the purpose of delay.

#### THE POSITION OF THE MINNESOTA SUPREME COURT.

All the questions urged here were urged before the Supreme Court of Minnesota.

That court held against the railway company for the following reasons:

1st: That plaintiff was engaged in interstate commerce and the Federal Act was supreme and could not be interfered with by any state tribunal (page 250, Record).

2nd: The Compensation proceeding went no further than *a finding* by the Deputy Commissioner which could not be a bar to the action under the Federal statute; in other words, that there was *no judgment* of a court of the State of Iowa.

## ARGUMENTS, POINTS AND AUTHORITIES.

1. There was *no judgment* in the State of Iowa, the order or award of the Deputy Industrial Commissioner not being a judgment.

The claim in the petition that the District Court of Steele County, Minnesota and the Supreme Court of Minnesota did not give full faith and credit to a "judgment" of the State of Iowa is unfounded, as a fact.

The claimed "judgment" in the State of Iowa was *merely an award* of the Deputy Industrial Commission.

While petitioner uses the term "judgment" somewhat loosely in its petition, there is no claim that there was an actual "judgment" entered, but merely that an act of the Deputy Industrial Commissioner of Iowa *amounted to* a "judgment."

The Iowa Industrial Commission is not a court. The Compensation Act in itself provides that the orders of the Deputy Commissioner, and later on review of the Commissioner, may, *upon application to the District Court*, ripen into a judgment.

*The District Court of Iowa never entered any judgment* pursuant to the award of the Deputy Industrial Commission.

Under the Constitution of the State of Iowa, it is provided:

"The judicial power shall be vested in the Supreme Court, District Court, and such inferior courts as the General Assembly may from time to time establish."



In the case of *Hunter v. Colfax Consolidated Coal Co.*, 154 N. W. 1037, the Iowa Supreme Court upheld the Compensation Act.

It never held, however, that the Deputy Commissioner or the Commission was a *court*. It simply held that because the Commission was given some powers of a judicial nature did not render the statute unconstitutional.

In many cases, it has been held that boards, such as Compensation Boards, Railroad Commissions, etc., are not courts.

See *State v. Railway Company*, 85 Iowa 516, 52 N. W. 490.

In *Hawkins v. Bleakly*, 243 U. S. 210, 61 L. Ed. 678, the Iowa Compensation statute was before the Supreme Court of the United States for consideration. In that case the act was sustained, Mr. Justice Pitney writing the opinion for the court, saying that it

“\* \* \* provides for a hearing before an *administrative tribunal* for *judicial review* upon all *fundamental and jurisdictional* questions.”

In other words, the Commission is an *administrative body*. It has the duty common to such administrative bodies, but is not a judicial tribunal.

Mr. Justice Pitney quoted from the Hunter case, referred to by counsel for petitioner herein, the following language:

“We hold that though the act does not in terms provide for judicial review, except by said appeal, *the statutes does not take from the courts all jurisdiction* in the premises.”

Following this quotation, Mr. Justice Pitney said that the act prescribed the measure of compensation,

“and the circumstances under which it is to be made and establishes *administrative machinery* for applying the statutory measure to the facts of each particular case.”

In *Mississippi Railroad Commission v. Illinois C. R. Co.*, 203 U. S. 335, 51 L. Ed. 209, there was a suit to enjoin the enforcement of an order of the Mississippi Railroad Commission.

The Commission took the position that the Federal Court could not enjoin because of Section 720, United States Revised Statutes, which prohibits a Federal Court from issuing the writ of injunction “*to stay proceedings in a state court.*”

The question then came up as to whether or not the Commission was a court within the meaning of that statute.

The Supreme Court of the United States, in the opinion by Mr. Justice Peckham, held that the Commission was *not a court* within the meaning of that statute, saying:

“The Commission is, however, not a court and is a mere administrative agency of the state.”

In Minnesota it has been stated that a court of record is a court having common law jurisdiction and whose powers are exercised according to the course of the common law.

*State ex rel. v. Webber*, 96 Minn. 422, 105 N. W. 105.

In *State ex rel. Wallace v. Craemer*, 85 Ohio St. 349, 97 N. E. 602, the Ohio court had for consideration the compensation statute passed by the Legislature of the State of Ohio. This was one of the early compensation statutes passed in this country.

It was claimed by the Ohio court that the act creating the Compensation Board delegated judicial power and, therefore, was invalid.

The Supreme Court of that state, however, in its opinion in that case said:

"Of course, if the Board is a court, there is an end of the whole matter, the statute would be unconstitutional. \* \* \* WE DO NOT CONSIDER THE BOARD OF AWARDS A COURT OR INVESTED WITH JUDICIAL POWER within the meaning of the Constitution. It is created by the act PURELY AS AN ADMINISTRATIVE AGENCY," which "does not vest it with judicial power within the constitutional sense."

Speaking of a proceeding under that statute analogous to the review under the Iowa Act, the court said that the "appeal"

"is not an appeal in the sense of appealing from one court to another, but is really the beginning of an original suit."

From the cases cited above, it is clear that *there is no judgment of any court of record in the State of Iowa*. There could therefore be *no failure* by the Minnesota court *to give full faith and credit* to the judgment of a sister state.

There was no judgment to which to give full faith and credit.

## RES ADJUDICATA OR ESTOPPEL FOR STATE COURTS.

It being shown that there was no judgment of a sister state involved, there could, of course, be no constitutional question as to the failure to give full faith and credit to the judgment of a sister state.

The act of the Deputy Industrial Commissioner is, however, set forth as a bar, even though it was not a "judgment."

Whether this act be or be not a bar is clearly a question for determination by the state court.

It presents no matter for the Supreme Court of the United States. The Minnesota Supreme Court as well as the District Court held that the plea of estoppel or *res adjudicata* was unavailing.

There being no "judgment" involved and no constitutional question to consider, the claim of *res adjudicata* or estoppel cannot now be considered by the Supreme Court of the United States because it presents merely a question for determination by the state court.

It does not present a Federal question in any sense, and does not give rise to any ground for the granting of a writ of certiorari.

2. The law of the United States is supreme and after an action is commenced under the Employers' Liability Law, *the right to maintain it cannot be defeated by subsequently commenced proceedings before the Iowa Industrial Commission.*

It can hardly be contended that the State of Iowa

can *interfere*, by an act of the Industrial Commission, or by any act of any legislative or executive body of the state, *with a Federal right*.

It is conceded in the petition that the Federal law is supreme, on page 11 of the petition, where the case of *Eric R. Co. v. Winfield*, 244 U. S. 170, among others, is cited.

Assuming the Federal law to be supreme, it is difficult to see what question there is for this court to determine in the case at bar.

Elder's right was that given by a Federal statute. The attempt to defeat the right was because of proceedings subsequently started under the State Compensation Law of Iowa.

Under the situation existing at the trial, when the offer was made to introduce the award of the Commissioner as a bar to the prosecution of the action under the Federal law, either the Federal Law had to yield to the State Law of Iowa, or the State Law of Iowa had to yield to the Federal Law.

The trial court held the Federal Law was supreme, and the rights of Elder could not be interfered with by any proceedings started before the Deputy Commissioner of Iowa subsequent to the commencement of his action to recover under the Federal statute.

The Minnesota Supreme Court took the same position.

A mere statement of the case shows that both the Minnesota courts were correct in the position they took.

It is to be remembered that the respondent,

Elder, at all times *resisted the attempt* of the Iowa Commission to award him compensation. When notice was served on him he filed an objection to the consideration of his case by the Commissioner, and in his objection set forth that his rights were governed by the Federal statute and that he had commenced an action in the District Court of the State of Minnesota.

3. Respondent was, as a fact and as a matter of law, as disclosed by the record, engaged in interstate commerce at the time he was injured.

Elder was engaged in interstate commerce under the undisputed facts in the case and under the concession of petitioner on page 4 of its brief:

"We will concede an issue of fact."

Respondent Elder was, as a matter of fact, under the record, engaged in interstate commerce.

Assuming this fact, Elder's rights could not be limited in any way by any state statute.

4. That the writ of certiorari herein is sought solely for the purpose of delay.

Viewing this record in its entirety and considering the facts:

1st. That there was no "judgment" in the State of Iowa, but merely an award of the Deputy Industrial Commissioner.

2nd. That the Federal law is supreme and is in conflict with the Iowa statute.

3rd. That Elder, as a matter of fact, was engaged in interstate commerce.

4th. That the decisions of the District Court and Supreme Court of Minnesota were unanimous in upholding Elder's claim of a Federal right—we cannot but come to the conclusion that the writ of certiorari in this case is prosecuted solely for the purpose of delay.

There is in fact no merit to the claim of petitioner.

A right under a state statute was set up to defeat a right under the Federal law. There is nothing upon which to base the claim that the writ of certiorari should be granted.

Should the writ be granted the Supreme Court could only hold, as it has in so many cases, that the law of the United States is supreme and that it cannot be brushed aside, nor rights thereunder denied because of any state statute.

#### CONSIDERATIONS OF PETITIONER'S POINTS AND AUTHORITIES.

On page 9 of the brief in support of the petition, appears the heading: "Binding Effect of the Iowa Judgment."

In several places, the Iowa "judgment" is referred to.

There was *no judgment in Iowa*. There was merely a finding of the Deputy Industrial Commissioner which had not even been approved by his superior

officer at the time the verdict in the case under the Federal Act was rendered.

#### ESTOPPEL.

Under the claim of estoppel, it is said that the finding of the Deputy Commissioner, although not *res adjudicata* in the broad sense, constitutes an estoppel because of the finding of intrastate commerce as a matter of fact.

*Congress intended rights under the Federal Act to be determined in courts operating according to the common law.* It was not intended that these rights be determined by a Deputy Compensation Commissioner.

Petitioner here claims that the Deputy Commissioner could determine the question of interstate commerce so as to bind the plaintiff.

In many cases interstate commerce is a question for the jury.

If petitioner be correct, a Deputy Commissioner could determine this question, and plaintiff will be deprived of his right to a jury trial.

Furthermore, after plaintiff had started this action under the Federal law, the railway company could apply to the Commission, have an award made by the Deputy Commissioner, and then, under the claim of *res adjudicata*, bar plaintiff from further pursuing his Federal right.

The statement of the proposition answers it.

Defendant could not be permitted to follow such a course in the hope of success, because, as has been



so often said, the Federal law is supreme and to it every state statute must yield.

On page 10 of the brief in support of the petition it is said that the only two authorities in the country are contrary to the conclusion reached by the Minnesota Supreme Court.

This is not correct. The *Williams case*, 202 Pac. 356, was one where *the beneficiary herself sought compensation* from the Compensation Board.

In the case at bar, *the railway company sought to have the award made*, and it was resisted by respondent.

In the case of *Dennison v. Payne*, 293 Fed. 333, there was merely an inference that a *judgment* might be binding, but the case was defeated on the ground that there was no identity of parties. Neither case is authority for petitioner's position.

The petition for a writ of certiorari should be denied.

No Federal question is involved.

There is no judgment of a sister state.

The questions determined are wholly for the State Court.

Respectfully submitted,

TOM DAVIS AND

ERNEST A. MICHEL,

419 Metropolitan Bank Bldg.,

Minneapolis, Minnesota,

LEACH & LEACH,

Owatonna, Minnesota,

Attorneys for Respondent.

(31,407)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 684

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,  
PETITIONER,

vs.

FRED A. ELDER

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE  
OF MINNESOTA

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[fol. 1] **IN DISTRICT COURT OF STEELE COUNTY****FRED A. ELDER, Plaintiff****vs.****CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Defendant****SUMMONS**

You, the above named defendant, are hereby summoned and required to answer the Complaint of the plaintiff in the above entitled action, a copy of which Complaint is hereto annexed and herewith served upon you, and to serve a copy of your answer to said Complaint upon the subscribers at their offices at 419 Metropolitan Bank Building, in the City of Minneapolis, County of Hennepin, and State of Minnesota, within twenty days from the service of this Sum-[fol. 2] mons upon you, exclusive of the date of such service; and if you fail to so serve a copy of your Answer to said Complaint upon the subscribers within the time aforesaid, the plaintiff will apply to the court for the relief demanded in said Complaint.

Dated this 30th day of October, 1923.

Davis & Michel, Plaintiff's Attorneys, 419 Metropolitan Bank  
Bldg., Minneapolis, Minnesota.

[fol. 3] **IN DISTRICT COURT OF STEELE COUNTY**

[Title omitted]

**BILL OF COMPLAINT**

Plaintiff for his complaint against the defendant in the above entitled cause alleges and states to the Court:

1st. That the defendant is now and during all the times hereinafter mentioned was a corporation engaged in owning and operating a steam railroad in and through the States of Minnesota, Iowa and Illinois, and as a common carrier by railroad in transporting both passengers and freight in interstate commerce.

2nd. That on and previous to the 13th day of February, 1923, the plaintiff was engaged in the service of the defendant as a servant and employe and as a brakeman, and it was a part of his duties to be on and about the engines and trains of the defendant.

3rd. That on the said February 4, 1923, in the line of his duty and in the course of his employment he was acting as a brakeman on one of the trains of the defendant running into and through the

[fol. 4] town of Pershing, Iowa, and that at about the hour of 12:20 P. M. acting in the line of duty he was in, around and about a caboose of said train; that while he was so working the defendant, its agents, servants and agents wilfully, wantonly, negligently, carelessly and recklessly ran a locomotive with a train of cars attached thereto into and against the train upon which the plaintiff was so working with great force and violence, derailing the said caboose and causing great injuries to the head, back, body and limbs of the plaintiff.

4th. That all the times herein mentioned the defendant was an interstate carrier and was engaged in interstate commerce; and that decedent was employed by the defendant as its servant and employe, and as such was working and engaged in interstate commerce at the time of receiving the injuries herein set forth.

5th. That the defendant, its servants, agents and employes knew or in the use of reasonable care could have known that the plaintiff was in and about said caboose, and that the said caboose was upon the line and track over which said locomotive and train was being operated, but that the defendant, its agents, servants and employes failed to exercise any reasonable care to prevent running said locomotive and train into said caboose and injuring the plaintiff, and neglected and failed to give the plaintiff any notice or warning of the fact that said locomotive and train was being operated at a high and dangerous rate of speed over the track upon which the said caboose was located and that there was danger of a collision.

[fol. 5] 6th. That at the time the plaintiff was so injured he was a vigorous and strong man capable of earning and was earning the sum of approximately \$300 a month, but that as the result of the wrongful acts of the defendant he was rendered permanently and totally disabled from performing any physical work or engaging in any occupation requiring physical effort and his earning capacity has been greatly reduced; that by the wrongful acts of the defendant he was caused to suffer great pain and anguish and his suffering will permanently continue; that by said wrongful acts he was further caused to sustain a great nervous shock and his health has been greatly broken down; that further by reason of said wrongful acts of the defendant he has been put to large expense for care, medical and surgical treatment and will be continuously put to further expense of like character in the future.

7th. That as a result of the injuries so sustained by and through the reckless, careless, negligent and wilful acts of the defendant as hereinbefore set forth the plaintiff has sustained damages in the sum of \$50,000.

8th. Wherefore plaintiff prays for judgment against the defendant in the sum of \$50,000 damages together with his costs and disbursements.

Davis & Mitchell, Attorneys for the Plaintiff, 419 Metropolitan Bank Building, Minneapolis, Minnesota.

[fol. 6]

## IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

## ANSWER

Answering plaintiff's complaint, defendant admits that it was and is a railroad corporation organized under the laws of the States of Illinois and Iowa and that it operated a line of railroad through the States of Illinois, Iowa, Minnesota, and other states, and that it was a common carrier of freight and passengers. Defendant also admits that on or about February 4, 1923, while plaintiff was in the employ of this defendant near the Village of Pershing, Iowa, he received certain personal injuries, the extent of which are to this defendant unknown. All other allegations in the complaint contained, defendant denies in whole and in part.

Further answering, defendant avers that said plaintiff's injuries were due to his own neglect and want of care and that such neglect and want of care contributed thereto and that on and prior to February 4th, 1923, plaintiff assumed the risk of his injuries.

[fol. 7] Further answering, defendant specifically denies that plaintiff was at the time of his injuries engaged in interstate commerce. On the contrary, defendant avers that plaintiff was at the time he received said injuries engaged and employed by this defendant wholly in moving traffic within the state of Iowa, and that at said time he was engaged wholly in intrastate commerce.

Further answering, defendant avers that plaintiff at the time of his injury was a resident of the State of Iowa and that his afore-said employment was referable to the laws of the State of Iowa and that said contract of employment was to be performed therein and all of the duties and liabilities of the parties were at all times during the term of his said employment governed and controlled by said laws of the State of Iowa and said contract of employment was made and performed in contemplation of the application of said laws to said contract of employment.

Further answering, defendant avers that at the time of said injuries to said plaintiff there were in full force and effect certain public statutes or laws of the State of Iowa duly enacted by the law making body of said State, to-wit: The General Assembly thereof and duly approved by the Governor of said State, the same being Title XII, Chapter 8-A, Supplement to the Code of 1913, as amended, by the 37th and 38th General Assemblies and hereinafter in this answer referred to as the Workmen's Compensation Law of the State of Iowa, as the same existed on February 4th, 1923, and for a long time prior thereto, is specifically referred to and made a part hereof as though fully set forth at length.

[fol. 8] Further answering, defendant avers that both defendant and plaintiff, in compliance with the terms and conditions of the Workmen's Compensation Act have elected to be bound by the terms thereof, and that the rights and obligations of the parties are determined by said Workmen's Compensation Law and not otherwise,

and that plaintiff should be entitled to recover only the damages provided in said act and not otherwise, in proceedings brought thereunder in the State of Iowa before the Industrial Commission of said state.

Wherefore, defendant prays that plaintiff take nothing by this action and that it have judgment for its costs and disbursements.

O'Brien, Horn & Stringer, Attorneys for Defendant, 1116  
Pioneer Building, St. Paul, Minnesota.

Due and personal service of the within Answer admitted this 19th day of November, 1923.

It is stipulated that the Workmen's Compensation Law of Iowa is properly pleaded with the same force and effect as though set out verbatim in said Answer.

Davis & Michel, Attorneys for Plaintiff.

[fol. 9] IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

REPLY—November 19, 1923

Plaintiff, for his reply to the answer of the defendant in the above entitled action, alleges and shows to this Court:

Plaintiff denies each and every allegation and each and every part thereof in said answer contained, except as the same admits the allegations contained in plaintiff's complaint.

Wherefore, plaintiff demands judgment as prayed for in said complaint.

Davis & Michel, Attorneys for Plaintiff, 419 Metropolitan  
Bank Building, Minneapolis, Minnesota.

[fol. 10] IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

Supplemental Answer

For supplemental answer to plaintiff's complaint herein, the defendant avers that at and during all of the times herein after mentioned and referred to, one A. B. Funk was and still is the duly qualified Industrial Commissioner of the State of Iowa, as provided in the Workmen's Compensation Act of the State of Iowa, as alleged in defendant's answer.

On or about January 7th, 1924, the defendant and the plaintiff having failed to reach an agreement in regard to the compensation

payable to the plaintiff under said Iowa Workmen's Compensation Act, the above named defendant did duly notify the Industrial Commissioner of the State of Iowa of such fact, and did file with said Industrial Commissioner an application for arbitration as provided by said act.

The above named plaintiff was given due and personal notice of the filing of said application, and thereafter, and on or about January 11th, 1924, said plaintiff duly appeared and filed his plea in [fol. 11] abatement. Thereafter, on February 4th, 1924, said plea in abatement was duly overruled, and said matter set for hearing for February 11th, 1924, and thereupon, and on said February 11th, 1924, the above named plaintiff personally appeared and filed his answer. That thereafter by stipulation duly made between the plaintiff and the defendant, the appointment of an arbitration committee was duly waived, and said matter, by stipulation of the parties, was duly submitted to Ralph Young, deputy industrial commissioner of the State of Iowa. At said hearing, both the plaintiff and the defendant duly appeared, and thereafter and upon a full hearing, said deputy industrial commissioner of the State of Iowa, on February 13th, 1924, duly filed his decision and findings, whereby it was determined:

"1. That in wreck occurring February 4, 1923, Fred Elder, respondent herein, sustained injuries arising out of and in the course of his employment as a freight brakeman by the Chicago, Rock Island & Pacific Railway Company, applicant in this proceeding, such injuries causing the said Fred Elder to suffer disability.

"2. That at the time of the injuries in question the average weekly wage of the said Fred Elder exceeded \$25.00.

"3. That at the time of the injuries in question the said Fred Elder was not engaged in interstate commerce so as to prohibit coverage of the case by the Iowa Workmen's Compensation Law.

"4. That the case is subject to adjustment under the Iowa Workmen's Compensation Law.

[fol. 12] Accordingly, the Chicago, Rock Island & Pacific Railway Company is hereby ordered to pay the said Fred Elder under the Iowa Workmen's Compensation Law at the rate of \$15.00 a week during the period of total disability resulting from the injury in question, payments starting as of the date of the injury. The Chicago, Rock Island & Pacific Railway Company is also ordered to pay the costs of this hearing."

Said decision has never been reversed, modified or set aside, but on the contrary is in full force and effect.

The defendant pleads said proceedings before said Industrial Commissioner in the State of Iowa, as res adjudicata, and as a determination of the rights of the plaintiff and defendant in this cause, and avers the fact to be that said proceedings are public acts, records and judicial proceedings of the State of Iowa, and as such are entitled to



full faith and credit in this court, under Section II, Article IV of the Constitution of the United States.

Wherefore, defendant prays that plaintiff take nothing by this action, and that defendant have judgment for its costs and disbursements herein.

O'Brien, Horn & Stringer, Attorneys for Defendant, 1116 Pioneer Building, St. Paul, Minnesota.

Endorsed: Due and personal service admitted February 19, 1924.  
Davis & Michel, Attorneys for Plaintiff.

---

[fol. 13] IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

REPLY TO SUPPLEMENTAL ANSWER

Now comes the plaintiff and for his reply to the supplemental answer of defendant alleges and shows to this court:

1st. Plaintiff denies each and every allegation and each and every part thereof in said supplemental answer contained, except as is hereinafter admitted, qualified or explained.

2nd. Defendant admits that the Industrial Commissioner of the State of Iowa did make an order substantially as set forth in the supplemental answer herein, but plaintiff alleges that the Industrial Commissioner was without any authority to make such order in said proceeding and specifically alleges that plaintiff's rights are governed and controlled by the Employers' Liability Act of Congress.

[fol. 14] Plaintiff further avers that since the making of said order, a petition for review of the same has been filed in accordance with the procedure in matters before said commissioner, and that said petition for review of said order has not yet been passed on or determined by said commission, nor has any court in any way affirmed or confirmed the award so made by said commissioner.

Wherefore plaintiff demands judgment as prayed for in said complaint.

Dated this 20th day of February, 1924.

Davis & Michel, Plaintiff's Attorneys, 419 Metropolitan Bank Bldg., Minneapolis, Minnesota.

[fol. 15] IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

**Settled Case**

**CAPTION**

It is hereby certified, that heretofore, to-wit, on the 1st day of March, A. D. 1924, the above entitled cause came on for trial and argument before the Hon. Fred W. Senn, District Judge, with a jury, at 2:15 p. m., in the court room, in the court house, in the City of Owatonna, in Steele County, Minnesota.

---

**APPEARANCES OF COUNSEL**

Messrs. Davis & Michel, St. Paul, Minnesota, and Messrs. Leach & Leach, Owatonna, Minnesota, appeared for the plaintiff.

Messrs. O'Brien, Horn & Stringer, St. Paul, Minnesota, and Mr. F. A. Alexander, Owatonna, Minnesota, appeared for the defendant.

---

And thereupon the following proceedings were had, viz:

[fol. 16] N. H. SCHELDROP, called and sworn as a witness for and in behalf of the plaintiff, testified as follows:

Mr. Davis:

Q. Will you please state your full name?

A. N. H. Scheldrop.

Q. Where do you live?

A. Minneapolis.

Q. And what is your business?

A. Surgeon.

Q. Are you a duly licensed and practicing physician and surgeon in Minnesota?

A. I am.

Mr. Stringer: The doctor's qualifications are admitted, if you wish that admitted.

Mr. Davis: All right.

Q. Of what school are you a graduate?

A. Regular.

Q. And what college?

A. Rush Medical College.

Q. And how long have you been practicing your profession in Minnesota?

A. Twenty-six years.

Q. Have you as a physician and surgeon been in charge of any hospital in Minneapolis?

A. At the Fairview Hospital, Minneapolis.

Q. How long have you been in charge of the Fairview Hospital in Minneapolis?

A. Ever since it was built, about seven or eight years ago.

Q. And previous to that, what was your experience along surgical lines?

A. I was operating at the Swedish Hospital.

Q. And, Doctor, have you had any other experience?

[fol. 17] A. Yes, sir.

Q. What is it?

A. I had post-graduate work in Germany, France, and I had been associated with Professor Dunsmore of the State University about two years; I have been in the United States army.

Q. During the World War?

A. Yes.

Q. Now, during those times did you have experience in examining men and observing their condition with injured backs and suffering from concussion of the brain?

A. I have.

Q. And during your entire years' experience, in examining men who have suffered injuries of the spinal or the spinal vertebrae and also concussion of the brain?

A. I have.

Q. I wish you would give the jury just briefly the extent of your experience, that is, the number of operations a day you perform on the average?

A. Well, that is different. I usually operate from five to eighteen cases three times a week.

Q. Five to eighteen?

A. Yes.

Q. And there are all different kinds of surgical cases?

A. General surgery, yes, sir.

Q. And have you had in the years of your experience occasion to examine a good many men with injured spines?

A. I have.

Q. And during your experience have you had opportunity and occasion to examine X-rays taken of men's spines and other parts of their bodies?

[fol. 18] A. Yes. I use that as a part of my general equipment in the office as well as in the hospital.

Q. Now, Doctor, you are acquainted with Mr. Elder, the plaintiff?

A. I am.

Q. And I will ask you, have you at our request examined him about six months ago?

A. I did on the 28th day of September last year.

Q. And that was at the request of Davis and Michael, his attorneys?

A. Yes, sir.

Q. And when you examined him at that time, I wish you would state to the jury just generally what you did to examine him and what history of the case you obtained from him?

A. We gave him the——

Mr. Stringer: Well, now, of course, I suppose you are going to follow this up.

Mr. Davis: Yes, we are going to follow this up, with the understanding that the history of the case may be given. Well, I would say that the understanding was we should call him out of order and instead of assuming so and so I ask him the history of the case, which we will follow up by Mr. Elder to the same effect.

Mr. Stringer: Yes, with that understanding.

Mr. Davis:

Q. Now, if you will proceed and tell them what examination you made, together with the history of the case he gave you.

A. The procedure is, we take a history, a detailed history, type-written on the regular history sheet. Then he is referred to the laboratory for lung findings and the urine analysis; then he is referred to an internalist, a man who practices internal medicine, [fol. 19] for the findings of the heart, lungs and stomach; and then he is referred to the X-ray laboratory for laboratory-findings, and practically the whole body is X-rayed; and then he is referred to me for the general examination, for the wind-up. From the examination, the history of the patient, the history he gave to me relating to the injury and how it happened and what took place afterwards, as far as he knew——

Q. Well, will you state that and relate to the jury?

A. Yes. The patient claimed that he was in a railroad wreck, one train ran into a caboose where he was sitting and that he was thrown out and that he was unconscious, was taken to a hospital and he was there between two and three days before he recognized anybody; he thought that he had been unconscious for quite a while, and when he begin to come to, he would remember that people had seen him and that he had called them by name, but he had no distinct recollection of anything that took place until after three days. The patient complained of a great deal of headache and soreness to his spine at the time, or immediately after the injury, and he also complained of a great deal of numbness and dizziness, particularly numbness over the left side and the left leg; he also complained of cuts and bruises and burns upon his body, in various parts of the body. The patient also stated that it took seven weeks before he could walk; that he was very nervous and restless and irritable; that he had considerable shooting pain running up through the back part of his head; that he was easily out of breath, and that he had pain through the left chest upon deep inspiration from taking a full breath. May I proceed with the examination?

[fol. 20] Q. Yes, Doctor.

A. Upon examination of the patient we found that he had a scar in the back part of his head in the hairy portion, the most prominent part of the head; we found that he had a scar over the right eye, outside of the eye, directly over the forehead, about three-quarters of an inch long; he had a scar over the small of his back,

one scar about an inch and a half long and very red; he also had several minor scars and burns or—they looked like that had been burns over the small of his back. The patient stated to me—I interrogated to say—that at the time of his injury he weighed 183 pounds; now he weighs 157 pounds. He has lost since the injury 26 pounds in weight. Upon examination, I found that he was very tender over the back bone, particularly over the small of the back, and also between the shoulder blades and down; I found that he was unable to bend down and touch the floor and straighten himself up without supporting himself, that is, when he got his hands on the floor and he tried to get up, he couldn't do it, he had to make use of his knees to work himself up; I find he couldn't bend backwards and he couldn't rotate his body very well from side to side, without considerable discomfort and pain; he was rather irritable, and when I examined him he perspired very freely and he turned pale on examination, as if he was under a severe nervous shock. The reflexes at first at the nervous system at that time were exaggerated; they were rather abnormally increased. At the present time his reflexes of the left side is markedly decreased and some of the reflexes are abolished. He complained at the time of the examination bitterly of headaches. The examination of his kidneys [fol. 21] were normal, and the examination of his blood was normal. The examination by the X-ray of his ribs showed that he had a fracture of the second and the third—

Mr. Stringer: Are you going to produce those X-rays?

Mr. Davis: Yes; we have them here.

A. And the fourth and the fifth, sixth, seventh and eighth rib, the back of the axillary line, and the ribs had knitted, but they were overlapped in this fashion, one finger over the other (illustrating with fingers),—

Mr. Stringer:

Q. Pardon me, Doctor, I didn't get the number.

A. Second, third, fourth, fifth, sixth, seventh and eighth, on the left side. The examination of his spine reveals that he has a crushing fracture of the body, of the first lumbar vertebrae. That is the big, the first big vertebrae that goes from the lower part of the spine, just below the last rib. This fracture was irregular in contour and compressed. Do you wish for my diagnosis at the time?

Mr. Davis:

Q. Well, I think I would take that up in detail now. Now, that completes practically the first examination?

A. Yes.

Q. I believe yesterday, in conjunction with Doctor McIntyre, you again examined him?

A. This morning.

Q. And did you test his reflexes this morning?

A. I did.

Q. Now, Doctor, assuming that he was a man in good health at the time of his injury, and assuming he sustained the injury that you have related, and assuming that he is suffering from headaches [fol. 22] ever since the injury to persist and still suffers from those headaches, that he suffers from dizzy spells, and still is bothered with those dizzy spells, has suffered with shooting pains in the head, and still suffers with them, I will ask you if you can state to the jury, assuming that he was unconscious for the greater part of one or two days, what, in your opinion, would produce those headaches, shooting pains and dizzy spells?

A. I can state it.

Q. How?

A. Yes, I can state it.

Q. Will you so state to the jury?

A. He had, taking into consideration what Mr. Davis described, he evidently had a concussion or a shaking up of the brain substance; that is, the brain is within a thin skull, as you know, and the shock makes a certain jar that disorganizes the *shells* of the brain and produces a great deal of traumatism, like a number of small lacerations and small hemorrhages into the brain tissue, as well as into the spinal cord.

Q. In your opinion, Doctor, at the time of the injury, taking into consideration the fact that he was unconscious in this wreck, you may state whether or not, in your opinion, he did suffer a concussion of the brain, as well as a concussion of the spinal cord?

A. To the best of my ability, I believe that he had a concussion of his brain and a concussion of the spinal cord.

Q. And in your opinion as a physician and surgeon, are you reasonably sure of that opinion?

A. That is my opinion.

Q. Doctor, in this case, from the X-rays—have you the X-rays with you?

[fol. 23] A. I have.

Q. Where are they? (Witness produces X-rays.)

A. Then here are several X-rays that—here is mostly that shows the spine.

(X-ray picture marked plaintiff's Exhibit 1.)

(X-ray picture marked plaintiff's Exhibit 2.)

Q. You have handed me a number of exhibits, some of which you have laid upon the table in front of the reporter and some of which you have handed me. I will ask you if those you have handed me contain—these are X-rays of his head and some of them duplicates of these?

A. They are.

Mr. Davis: If you wish to have those for cross examination, I will submit them to you.

(X-ray picture marked plaintiff's Exhibit 3.)

(X-ray picture marked plaintiff's Exhibit 4.)

(X-ray picture marked plaintiff's Exhibit 5.)

(X-ray picture marked plaintiff's Exhibit 6.)

Q. Now, Doctor Sheldrop, I am handing you Exhibits One to Six, and I wish you would take them in their order, chronologically, and state to the jury what each one shows with reference to the injuries of Mr. Elder—that Mr. Elder sustained?

A. Number one shows a crushing injury to the first lumbar vertebra, with an irregular articulating surface above. Do you wish me to show this to the jury?

Q. If you will point out, yes.

A. This light is not very good, but here is a normal vertebra, there is another normal, here is the crushing injury to this one. You see, it is only about one-half the size. It is very hard for people [fol. 24] who are not trained in actual work to know the difference. Of course, they don't know what the normal one is like. But I think you can all see with the poor light that the difference from here to there is nowhere as great as from here to there; also, that this vertebra is clean-cut, above and below, whereas this one is irregular here.

Q. I will ask you this, Doctor, this space which is narrower between the two vertebra—

A. That is the crushing injury.

Q. That indicates the crushing injury to the first lumbar vertebra?

A. Yes.

Q. Very well. If you will take number two?

A. Number two is an X-ray of the upper part of the spine. It shows a bending of the spine laterally this way. This is straight. Whether that was due to the injury or not I don't know, as that happens very often that people haven't got a straight spine.

Q. Could the injury be one of its causes?

A. It could be.

Q. And is traumatism furnished because of curvature of the spine?

A. One of the causes; not so frequent.

Q. Number three?

A. Number three shows the fractures of the ribs. Now, if you compare them with the other side, you can see they are perfectly smooth here; here they overlap.

Q. Now, looking at exhibit three, at the rib which appears to be next to the top here, is that where the fracture appears?

A. Yes, that is the fracture.

Q. And going down on the exhibit three, will you point out where the fractures appear on each of the ribs?

[fol. 25] A. One after the other, (indicating).

Q. Number four?

A. Number four shows identically the same condition.

Q. As to the fracture of the ribs?

A. As to the fracture of the ribs.

Q. Number five?

A. Will I be permitted to explain?

Q. Yes.

A. When he came to me, he stated that at the hospital they had

taken an X-ray and he had a fracture of his pelvic bone, and for that reason——

Mr. Stringer: Are you claiming that, Mr. Davis?

Mr. Davis: I don't know. That is why I asked you if you have the X-rays here.

Mr. Stringer: Yes; I expect to have them here.

A. Now, I am unable to state whether he had a fracture there or not, for this reason, if he has had a fracture—this pelvic bone is a very broad bone and he might have had a fracture, and if it was healed, it probably wouldn't show. The only thing I find in this picture is a slight irregularity, about the sacral iliac joint but, whether this irregularity is due to the injury or not, I can't tell.

Mr. Davis:

Q. Asking you this, that is exhibit five, I expect, that is an X-ray of the pelvis, yes, and I have one here that is also an X-ray of the pelvis, I believe?

A. I think both are the same thing.

Mr. Davis: Do you wish us to introduce this one?

Mr. Stringer: Well, if you are claiming it.

(X-ray picture marked plaintiff's Exhibit 7).

Mr. Davis:

Q. Go ahead.

[fol. 26] A. Number six is an X-ray taken from the ribs down, from this, from the eighth rib down to the middle part of the pelvis. It shows the same irregularity of the pelvis.

Q. Now, Doctor, from your physical examination of Mr. Elder and the examinations and what you say is disclosed by the X-rays, that you have just testified to, I will ask you to state to the jury whether or not Mr. Elder has sustained a permanent injury to his spine?

A. From the—yes, he has sustained a permanent injury to the spine—to the spine.

Q. And this crushing fracture of the first lumbar vertebra, as shown by the X-ray, you may state whether or not that, in your opinion, that injury to the first lumbar is a permanent injury?

A. That is a permanent injury.

Q. And from your experience as a physician and surgeon, you may state whether or not that injury, in your opinion, will permanently incapacitate him from performing manual labor?

A. To the best of my ability, I believe that he will never be able to do any hard work.

Q. In other words, in your opinion, you may state to the jury whether or not he will be able to have the use of that spine and back in bending and working as a normal man.

Mr. Stringer: Objected to as leading.



Mr. Davis:

Q. State whether or not, in your opinion, he will be able to use his back in bending and working as a normal man would.

A. He would be able to be around and—well, I would have to modify that statement by certain other facts that comes into this case. Do you wish to confine myself entirely to this locality of injury?

[fol. 27] Q. Well, take into consideration the entire condition in which you found him as bearing upon the question of permanent injury to his spine.

A. Taking into consideration the general condition of the patient at this time, he is absolutely unable to do any manual labor whatsoever, and it is very doubtful that he will ever be able to do any manual labor.

Q. Upon what do you base that opinion, Doctor?

A. I base it upon the nature of the injury, the history of the case, my personal examination, my personal experience in those cases and upon the findings of such an examination.

Q. And do you also base it upon the length of time his incapacity has, since the injury—

Mr. Stringer: Objected to as very leading.

The Court: Objection sustained.

A. And also upon a finding, which was rather surprising to me and which I hadn't expected. When I first examined him, I found that the reflexes were abnormally increased, and today when I examined him I found that the reflexes were gone practically, some of them were very much less, and the babinsky reflexes of the foot was entirely gone, which shows and proves that the patient has a permanent injury of the spine.

Mr. Davis:

Q. That you are certain of, are you, Doctor?

A. Yes, sir.

Q. Now, Doctor, with reference to the ribs that were fractured, are those a permanent injury, or if they will ever return to their normal condition?

A. The ribs are a permanent injury, but from the fracture of the ribs he will suffer no bad result; it will not interfere with his working ability.

[fol. 28] Q. And with regard to the fact that he has lost weight from 183 to 157, when he was injured a year, what would that indicate as a physician to you?

A. That would indicate that his normal repair forces haven't gotten into operation and that his vitality is low.

Q. With reference to taking into consideration that when you first examined him in September his reflexes were exaggerated, that when you examined him today there were some of them diminished and some of them totally absent, I will ask you to state to the jury what that indicates to you as a physician and surgeon?

A. That indicates a lesion of the cord—the spinal cord.

Q. A lesion of the spinal cord?

A. Yes, sir.

Q. And in your opinion is that a permanent or temporary condition?

A. That I believe is permanent. Now, may I make a statement in connection with that?

Q. Yes, sir.

A. I perhaps should answer that—shouldn't say that without some modification. I would like to give the reason, of course. I don't want to be misunderstood.

Q. If you will, please.

A. There is certain condition which takes place in the spinal cord that although the lesion is permanent, through years of training you may train certain nerves back to perform part of that function, and in answer to Mr. Davis' question I couldn't say positively that but what he in course of time may train himself about certain function, but as far as any practical purpose is concerned, so far as any [fol. 29] manual labor is concerned, it is a permanent injury.

Q. Yes. Now, Doctor, with reference to his being out of breath and pale and perspiring, what do those things indicate, please?

A. I think that is entirely due to psychoneurosis.

Q. Tell the jury what that means, if you please?

A. It is a form of change in the nervous condition of the brain whereby the nerve centers have become fatigued, or, rather, that the battery has become discharged and is not able to recharge itself. I believe that explains that better.

Q. And, Doctor, assuming that he has had continuous pain in his back and hips ever since the injury, I will ask you whether or not that would be an effect in determining the permanency of the injury?

A. Yes, it would.

Q. Assuming that he was unconscious and sustained a concussion of the brain, I will ask you whether or not, from your experience as a physician and surgeon, what effect, if any, such a concussion of the brain and the fact that he was unconscious for that length of time is likely to have upon him?

A. Mr. Davis, all brain injuries are a very hard to state what they are—ultimately may turn out to be. There are all kinds of possibilities,—they may either recover, they may be stationary, and it may go into a form of insanity.

Q. This evidence of unconsciousness for a considerable length of time, is that one of the evidence of a concussion of the brain?

A. Pardon me, I had another thing in mind to answer that [fol. 30] first question. You are a little too fast for me.

Q. All right.

A. There is also with that brain injury another aspect, and that is the well person itself, a man sometimes forgets who he is, he forgets his former life and he changes his habits; if he has been a man who was of a nice disposition, he becomes some times the op-

posite—ugly, irresponsible, irritable, vicious and uncontrollable, and vice versa. Now, if you will kindly ask me the——

Q. Doctor, when you examined him, you found him wearing a brace?

A. Yes, sir.

Q. And what was that brace put on there for?

A. For the purpose of relieving the pain of his spine and to support it.

Q. And you know both times you examined him he had that brace on?

A. All the times I have examined him, seven or eight times.

Q. And assuming that he was given that brace by their doctor, or one of the company doctors, you may state what the purpose of it would be?

A. For the purpose of relieving his pain on motion, and to support his spine.

Mr. Davis: I think that is all. You may take the witness.

Cross-examination.

Mr. Stringer:

Q. Doctor, you made these various examination for the purpose of testifying in this case, did you not?

[fol. 31] A. Well, I did not; I made it for Davis and Michel. I didn't know until——

Q. But you did not make your examination for the purpose of treating him?

A. No.

Q. You have never been employed for that purpose?

A. No.

Q. Now, so far as the concussion of the brain is concerned, as I understand, he has completely recovered from that?

A. No, he has not.

Q. He may; with brain injuries you can't tell what will happen?

A. That is true.

Q. But none of these things have happened that you say might happen? Now, just answer the question, Doctor?

A. Yes. I was just trying to get a suitable answer to that. He shows now a mental irritability. If I am permitted, I would like to explain what I mean by that.

Q. Well, now, I think we understand it. He is irritable, is that the idea?

A. Yes. I want to say that when I examined him this morning, I made a certain test and he began to cry. Now, a normal man wouldn't do that, and that shows that he still is suffering from the effect of the concussion of the brain.

Q. In other words, his nervous system has been affected by this accident?

A. Yes.

Q. That is the plain English of it?

A. Yes.

[fol. 32] Q. And, of course, you would expect that as things went on his nervous system would improve, wouldn't you?

A. I would like to see it improve. I expect it, yes; in many cases we expect it.

Q. Then you would expect it in this case?

A. Yes, I think it would.

Q. And, of course, the necessity of having a law suit and about to go into the trial of a case is wearing on a man's nerves, is it not?

A. Yes, that is true.

Q. The fact is there is such a well recognized disease among the medical profession as being induced by pending litigation?

Mr. Davis: Now, I don't get the question.

Mr. Stringer:

Q. Isn't there?

Mr. Davis: Let's get the question. I can't understand it. If you understand it, you may answer.

A. Well, I wouldn't say exactly. I know what you mean all right, and if I can answer it accordingly.

Mr. Stringer:

Q. But I didn't state it right?

A. Yes, you state all right, but you don't make a distinction between the—but I will answer it in this way,—no, there is no disease induced.

Q. A nervous condition brought about by it?

A. The nervous condition, the symptoms of nervousness, that is true.

Q. Are induced by the pending litigation?

A. Yes.

Q. When the litigation is over, you would expect that nervous condition to disappear largely?

A. Yes, quiet down considerably.

Q. So that in the course of time, as his mind would ease, you would expect most of these mental diseases to disappear?

[fol. 33] A. You mean—is this a hypothetical question or asking me about his case?

Q. No; I am asking you about his case.

A. I wouldn't say either way.

Q. Of course, you are not a nerve specialist, are you?

A. No, I am not.

Q. Now, the ribs, while they were crushed all right, no question about that, have knitted?

A. Yes.

Q. And while not perfectly, they cause him no discomfort?

A. They are overlapping and he says that he has pain there.

Q. Well, as far as you can say, they are perfectly good ribs?

A. Yes.

Q. And would not interfere with his manual labor?

A. No.

Q. Then as I understood you, the only thing that you think will interfere with manual labor, is this fracture of the vertebra?

A. I would like to make an additional, as long as we are talking about the rib, you asked me that question, and I would like to answer that fully. It is only this, that when you have had a fractured rib, or any fracture anywhere in the body, that if there is any rheumatism in the system afterwards it is apt to take place in this fracture rib. This manner he may have considerable pain.

Q. Well, nothing that would interfere, as far as his ribs are concerned, with manual labor, except as you have indicated?

A. That is all.

[fol. 34] Q. Now, you say there is a fracture of one of the vertebrae?

A. The first lumbar.

Q. What sort of a fracture is that?

A. That is a crushing injury, or what we call a compression fracture.

Q. Well, what does that mean, that it is cracked?

A. It means that the vertebra has been chipped off and driven in, compressed, squeezed.

Q. Now, there is only one of those vertebrae that is in any way injured?

A. Yes, sir.

Q. The pelvis, as far as you can say, is all right?

A. No, the pelvis isn't all right. There is a deformity of the sacral iliac joint, but I don't know whether that deformity was due to this injury or if it has existed prior to this injury.

Q. No way you could tell about that?

A. I couldn't tell.

Q. Nothing in the X-ray pictures to indicate?

A. Except that it is not normal on one side.

Q. Nothing in the nature of the injury that would lead you to believe that it had been?

A. Except his own statement that he did have a fracture there.

Q. If he did have a fracture, that fracture is——

A. Is healed up.

Q. Is healed up?

A. Yes, sir.

Q. And, of course, as far as may be concerned, the curvature of the spine, you are unable to tell whether that came from this injury or not?

A. Yes, I can't tell them.

[fol. 35] Q. A great many other people have curvature of the spine?

A. Yes; from sitting in school houses over a desk, or things of that kind.

Q. And that, as a rule, is not a very—is not a disabling defect at all?

A. No. There is only one reason why I thought it might have been due to this injury and that is that he has considerable tenderness on pressure over this particular area, so that it might have been caused by this injury.

Q. And that, of course, wouldn't lay him up?

A. I beg pardon?

Q. I say that, of course, wouldn't interfere with manual labor, that curvature of the spine?

A. No; it would not.

Q. The loss of weight that you refer to is a loss of weight that you will naturally expect of a man who had gone through and had an injury as severe as this, would you not?

A. No, Mr. Stringer; he may have loss of weight from the injury and from the confinement and the shock, but after—if he was a well man, he should recuperate; at his age, he should recuperate before this time. I mean he should be back to normal.

Q. Of course, he hasn't been able to do any work, as you understand it, during this past year?

A. Yes.

Q. In fact, remaining in the house would have a tendency to reduce weight, would it not?

A. That would have a tendency to increase weight.

Q. His kidneys were normal, were they not?

A. Yes. His blood was normal, too.

[fol. 36] Q. And his blood normal. His general health was fairly good, Doctor, was it not?

A. No, it is not good, no; his general health is bad.

Q. I think that is all.

Mr. Davis: That is all, Doctor.

The Court: We will take a recess until ten o'clock Monday morning.

(March 3, 1924, 10:00 a. m.)

SAMUEL WOODS, called and sworn as a witness for and in behalf of the plaintiff, testified as follows:

Mr. Davis:

Q. Mr. Woods, state your name?

A. Sam Woods.

Q. Where do you live?

A. I live at Allerton, Iowa.

Q. Employed by the Rock Island Railroad?

A. Yes, sir.

Q. Were you employed at the time of this accident? You were so employed at the time of the accident?

A. Yes, sir.

Q. Now, as an engineer did you receive any orders shortly before the accident to go to Chariton?

A. Yes, sir.

Q. Have you that order, or a copy of it, with you?

A. Yes, sir.

Q. Will you produce it?

(Train order marked plaintiff's exhibit 8).

Q. Handing you Exhibit 8, you may look at it and state whether [fol. 37] or not that is an order, original of which you received while on your way into Chariton, shortly before the collision?

A. It is.

Q. Will you read that order?

Mr. Stringer: Well, just a minute. Do you offer it, or—

Mr. Davis: Why, yes, we offer it in evidence. Any objection?

Mr. Stringer: I don't know what it is.

Mr. Davis: You don't know what it is?

Mr. Stringer: Well, now, Mr. Davis, to shorten our record, we will admit that there was a collision on the way into Chariton and that it was due to the fault of the company.

Mr. Davis: Well, then, let's have the record, it is admitted, while the plaintiff was on his way into Chariton a collision occurred due to the negligence of the defendant and that such negligence was the fault of the defendant and that such negligence was in whole or in part the contributing and proximate cause of the *defendant*.

Mr. Stringer: Yes.

Mr. Davis: That is conceded. That is all, Mr. Woods.

Q. Just a moment, Mr. Woods. Mr. Woods, how long did you work on this particular work there, switching the mines?

A. Well, which do you mean, engineer or fireman?

Q. Either one or both.

A. Well, I had been in the neighborhood of around about four or five years.

Q. Now then near these mines there is what is known as Pershing Yard, is there not?

A. Yes.

[fol. 38] Q. And in that Pershing Yard there is two tracks and one is a storage track, and this one is known as number one, and one is known as number two?

Mr. Stringer: Well, your Honor, I think the question is extremely leading.

The Court: The questions are leading.

Mr. Davis: Is there any objection on that ground?

Mr. Stringer: Not to this particular question.

Mr. Davis: All right.

Q. Are cars placed on number one, cars placed by you in switching on number one at the Pershing yard at times?

A. Yes, sir.

Q. And where do those cars go?

A. The cars on number one goes west.

Q. And the cars placed on number two—

A. Goes east.

Q. In switching in those yards and taking cars out, you may state whether or not you take cars out, Mr. Woods, going into the state and out of the state?

Mr. Stringer: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Davis:

Q. You may answer.

A. As far as the movement of the cars, I know nothing of them.

Q. Do you know this, that when you switch cars in the mine and pull out, you pull out loads do you?

A. Yes, sir.

Q. And so far as you know, it doesn't make any difference whether the loads are going in or out of the state, you pull them all out of the mine?

Mr. Stringer: Objected to as leading.

The Court: Objection sustained.

[fol. 39] Mr. Davis:

Q. Do you know from the experience you have had in working for the Rock Island whether they pull a car out of that mine going out of the state?

Mr. Stringer: That is objected to as immaterial. The question gets down to what they were doing at the particular time; generally makes no difference. I object to any general questions as to what they had done. (Question read.)

The Court: The question is too broad, in the opinion of the Court.

Mr. Davis:

Q. Mr. Woods, going from the mines to the Pershing yards, how far is it?

A. To the furtherest mine, you mean? About eight miles.

Q. From the mines where you worked was it two and three?

A. About eight miles.

Q. Would those cars be hauled from two and three up to the Pershing yards?

A. They would.

Q. And placed on tracks one or two?

A. Yes, sir.

Q. Going from Pershing yards to Chariton, how would you get there?

A. By train orders.



Q. And what tracks would you use in going there?

A. Use the main line.

Q. The main line track?

A. Yes, sir.

Q. From Pershing yards west to Chariton?

A. Yes, sir.

Q. And is that the main line track upon which the cars run from Minneapolis to Kansas City?

A. It is.

[fol. 40] Q. Freight and passenger?

A. Yes, sir.

Q. Intrastate as well as interstate trains?

Mr. Stringer: Objected to as irrelevant and immaterial.

The Court: Overruled.

Mr. Davis:

Q. Intrastate as well as interstate trains run over that line or railroad?

A. Yes, sir.

Q. Is it the whole line of road connecting on which the Rock Island runs from Minneapolis to Kansas City?

A. It is to that point.

Q. And with reference to your running on that track and going to Chariton on that day in question, you may state to the jury whether or not you ran your train under orders with reference to the movement of those other trains, both intrastate and interstate?

Mr. Stringer: Objected to as irrelevant and immaterial, under my contention.

The Court: Overruled.

Mr. Stringer: Please add, irrelevant and immaterial and calling for the conclusion of the witness and speculative.

Mr. Davis: That is withdrawn. It may call for the conclusion of the witness.

Q. When you run those trains, did you have anything to do with going into Chariton that day, as well as other times, with reference to other trains that might be running on there, on the main line?

A. I don't quite get your question.

Q. Well, would your running of your train have anything to do [fol. 41] with the movement of it with reference to other trains that might be using the line?

A. Yes, sir.

Q. In what way?

A. Well, we would have to have time to go from Pershing yards into Chariton.

Q. Yes, I refer to the movement of other trains besides your own?

A. Yes.

Q. Would you run with any reference to them?

Mr. Stringer: That is objected to as irrelevant and immaterial and speculative.

The Court: Overruled.

Mr. Stringer: Exception.

A. Yes.

Mr. Davis:

Q. Now, for instance, handing you exhibit eight again, that is an order that was given you with reference to the running of your engine and caboose?

A. Yes, sir.

Q. And it states here—

Mr. Stringer: Wait a minute.

Mr. Davis: We offer it in evidence.

Mr. Stringer: Well, I object to it, in view of my concession of negligence.

Mr. Davis: Well, we offer it on another issue entirely, showing that the other cars have come through.

Mr. Stringer: That is wholly immaterial, so far as interstate commerce is concerned.

The Court: Overruled.

Mr. Davis:

Q. Now, Mr. Woods, this reads as follows: I think I can read it—No. 912, engine unknown—is that right?

A. Yes, sir.

[fol. 42] Q. And all eastward extras wait at Chariton until 1:30 p. m.

A. Yes, sir.

Q. Now, that eastward extras wait at Chariton until 1:30 p. m., Chariton was west of where you were going?

A. Yes, sir.

Q. And this order would mean that all freight trains and passenger trains coming into Chariton—

Mr. Stringer: Objected to as leading.

The Court: Objection sustained.

Mr. Davis:

Q. What would that mean with reference to the trains that came into Chariton? I thought I would save a little time.

Mr. Stringer: I object to it as irrelevant and immaterial. And may the record show that I object to questions along this line and that I may have an exception to the court's ruling. Now, we have admitted for the purposes of this case that there was a collision and that it was due to the fault of the company. Now, with that concession, it is wholly immaterial what trains had departed or what trains had not departed.

The Court: As I understand it, however, that the question as to whether or not the plaintiff was engaged in interstate commerce at the time of the collision is in dispute.

Mr. Stringer: I object to that as wholly immaterial to that issue.

Mr. Davis: Our position is that if the train was run with reference to the safety of the other trains on the main line, it would be—

Mr. Stringer: I object to it on that ground.

The Court: I think on that question as to whether or not the [fol. 43] train in question here was run with reference to other trains that were engaged in interstate commerce wouldn't determine the question in this case as to whether or not the plaintiff was engaged in interstate commerce.

Mr. Davis: Well, I might make myself plain. If the plaintiff, as well as the conductor, had to run their train with reference to the safety of other trains on that main line, then the ultimate question is whether that at that time so far removed from the interstate work of the carrier and the safety of those persons is not a part of the interstate work of the carrier.

Mr. Stringer: I object to that as immaterial.

Mr. Davis: It may be admitted for the purpose of the record that generally speaking at the times involved, as well as other times, the Rock Island Railroad was a railroad engaged in intrastate as well as interstate commerce. We propose to show that he gets an order to run with reference to certain trains—extras—from the west, and let us assume that we follow that up and show that those extras from the west then were from outside of the state and their order is to run with reference to them. Can it be said, as a matter of law, that it is not an element to be considered by the jury ultimately upon a question of fact, if not of law by the court, of interstate commerce?

The Court: I think the question as to whether or not the plaintiff was moving with reference and in regard to interstate trains would not be an element on the question as to whether or not the plaintiff was engaged in interstate commerce, and I shall sustain the objection.

Mr. Davis: We offer to show by this witness, as well as other witnesses, that when the plaintiff ordered by the defendant company [fol. 44] to go upon the main line track and from Pershing yards to Chariton, Iowa, that it was part of the duty of the train crew, of which he was a part, to run said train, engine and caboose with reference and subject to the arrival and departure of interstate trains on the main line, and that before the conductor or engineer, their engine and caboose, could enter upon the main line, they would have to receive orders permitting them to enter the main line and go to Chariton, and that those orders necessarily would determine their right to go upon the main line by reason of the arrival or departure of interstate trains using the main line.

Mr. Stringer: Objected to as irrelevant and immaterial.

Mr. Davis: And also to show further by this witness that at the time they entered upon the main line there was at Chariton, Iowa, an interstate train which was delayed or waiting the arrival of this engine and caboose at Chariton before he could proceed on his inter-

state journey, and that the running of this engine and caboose caused this interstate train to be held up at Chariton, Iowa.

Mr. Stringer: Objected to as irrelevant and immaterial.

The Court: Objection sustained.

Mr. Davis: That is all, Mr. Woods. Exception, please.

MRYTLE HANLON, called and sworn as a witness for and in behalf of the plaintiff, testified as follows:

Mr. Davis:

Q. If you will, kindly state your full name.

A. Myrtle Hanlon.

[fol. 45] Q. And you are employed by the Rock Island?

A. Yes, sir.

Q. And have been employed by them for some time?

A. Yes, sir; seven years.

Q. And I believe you were a witness at some hearing in Des Moines?

A. Yes, sir.

Q. And you are familiar with the custom and manner of handling of the business of the Rock Island at the mines, are you?

A. Yes, sir.

Q. And have been for a good many years last past?

A. Seven.

Q. And during those seven years, from your work and employment with the Rock Island, are you familiar with the method and manner of switching those mines near Pershing tracks or siding?

A. Yes, I am.

Q. And with reference to those mines, what does the Rock Island take out from those mines?

Mr. Stringer: I object to that as irrelevant and immaterial.

The Court: Overruled.

A. Coal.

Mr. Davis:

Q. They take coal, loaded cars of coal, is that correct?

A. Yes, sir.

Q. And those loaded cars of coal taken from the mines, do you know their—the loaded cars of coal when they are taken from the mine, do you know from your work where they are placed?

[fol. 46] A. Yes; they are placed at Pershing on number one and two tracks.

Q. And do you know from your work and experience where those on number one, where they go?

A. Yes, sir; they are west bound.

Q. And do you know where those on number two go?

A. East bound.

Q. Now, then, with reference to those cars, from your experience and general work there covering a number of years, including up to today and including the day of the accident, I wish you would state to the jury whether or not when these mines are switched and the loaded cars are taken out, whether cars both for points inside and outside the state are switched to tracks one and two.

Mr. Stringer: That is objected to as irrelevant and immaterial. It doesn't make any difference the day before or a week before, or what was done afterward; the question is what was done on that day; and I object to the question in that form.

The Court: Do counsel expect to connect up this evidence with other evidence showing that at the time——

Mr. Davis: That at the time they had interstate shipments.

The Court: Yes.

Mr. Davis: Yes; and that it was the general custom, both at this time and all other times, to have intrastate and interstate cars taken out of that mine and placed upon those tracks.

Mr. Stringer: What was done that day is incompetent.

The Court: I will hold it is competent, if it is connected up.  
[fol. 47] Mr. Stringer: Well, what can you connect up? The rule laid down——

The Court: Overruled.

Mr. Stringer: Exception.

(Question read.)

A. Yes, they are.

Mr. Davis:

Q. And you know from your handling—how did you know or ascertain that? Did you have any manifests delivered to you?

A. Yes, sir.

Q. And do those manifests show you the number and the origin and point of destination and contents of a car?

A. Yes, sir.

Q. And you know from your experience in looking over these manifests which are delivered to you, do you, that when there is a bunch of cars from the mine to be hauled to tracks one and two, they haul them in reference as to whether they go in or out of the state.

Mr. Stringer: Objected to as incompetent, irrelevant and immaterial and leading.

Mr. Davis: Withdrawn.

The Court: Objection sustained.

Mr. Davis:

Q. Now, then, with reference to the hauling of these cars, are these mines switched practically every day?

A. Well, almost.

Q. And in switching these mines, you may state whether or not from your experience cars both for points inside and outside the state are hauled out of those mines.

Mr. Stringer: Objected to as irrelevant and immaterial, nothing to do with the——

The Court: Overruled.

[fol. 48] A. Yes, sir.

Mr. Davis:

Q. And is there any distinction made in hauling them out as to whether they go in or out of the state?

A. No; not that I ever knew of.

Mr. Stringer: Same objection.

The Court: Same ruling.

Mr. Davis:

Q. Now, Miss Hanlon, on the particular day in question, with reference to the particular day in question, that was a Sunday that Mr. Elder was injured.

A. Yes, sir.

Q. Were you at that time at Williamson?

A. I was.

Q. And did you know from your custom of doing that work how the information would be conveyed to you as to what these manifests contained?

A. I don't know just what you mean.

Q. How would the information be conveyed to you at Williamson of what these cars contained?

A. It was given me on the telephone by the conductor when they went to Chariton for dinner.

Q. That was Conductor Hope?

A. Yes, sir.

Q. Now, these manifests, do you know from the custom of doing the Company's business whether or not these manifests, how would you receive them when the cars of coal were picked up by the train? Well, to make it a little simpler—I don't think you will be confused, because it all appears in this record—when Mr. Hope, as the conductor, of that car, would pick up these coal cars, they would be [fol. 49] delivered to you, would they not?

A. Yes, sir.

Q. And those manifests would show the combined destination and contents and car number in issues?

A. Yes, sir.

Q. And you may state after he got those manifests whether or not there would be two copies of them.

A. Well, I don't know whether—he always would telephone the billing to me and then mail me a manifest on No. 70.

Q. Now, then, Miss Hanlon, you say that after he phoned you the numbers he would phone you at Williamson the numbers and destination, of course.

A. Yes, sir.

Q. And then later on after he would either go into Chariton or Williamson, was it part of his duty to deliver these manifests to you?

A. He would deliver them to the agent at Chariton and he would mail them to me on the train.

Q. That was part of Mr. Hope's duty to deliver these manifests either to the agent at Chariton for forwarding to you or they were sent personally to you.

A. He always did.

Q. And did you then receive these manifests in the usual course of handling the Company's business? I don't mean these particular ones, but generally.

A. Oh, yes.

Q. Now, then, these manifests would show the points of origin and the numbers on these—of the cars was on a rather light green [fol. 50] paper, are they not, sort of pinkish?

A. No; I guess they are white paper.

Q. And on this day in question did you receive a phone from Mr. Hope giving you the point of destination of a number of cars?

A. Yes, sir.

Q. Did you receive from Mr. Hope—when did you get this information?

A. Well, I received billing on one drag at 9.30 and another at 11.50.

Q. Now, when you received that information in regard to the drag at 9.30, you may state whether or not, to the jury whether or not you were informed over the phone by Mr. Hope that in that drag, which had been taken out of the mine, there were two cars of—loaded car for St. Joseph, Missouri.

A. Yes, sir.

Q. There was two cars in that first drag that Hope phoned you about consigned from Iowa to St. Joseph, Missouri.

A. Yes.

Q. And, of course, you don't know where those cars were placed except the Missouri on track one.

A. That is all I know of.

Q. Now, then, were there in that first drag any cars consigned for points in Missouri outside of St. Joseph—Trenton, Missouri? You made a memorandum, did you not, at the time, Miss Hanlon?

A. Yes, sir.

Q. Will it be of any assistance to you if you have this memorandum?

A. Yes. I don't remember about the train.

[fol. 51] Q. Now, if you can answer my question.

A. No, sir, not on the first drag.

Q. Not on the first drag. On the second drag, which was phoned you at 11.30, will you tell the jury how many cars were in that second drag for Trenton, Missouri?

A. There wasn't any.

Q. Were there any cars switching that day or handled for Trenton, Missouri?

A. Not to my knowledge.

Q. Haven't you records showing that there were some for Trenton, Missouri?

A. No, sir. This is all I copied the other day.

Q. Will you state that Mr. Hope did not inform you over the phone that there were a number of cars for Trenton, Missouri?

A. Yes, sir.

Q. When did you first hear of Trenton, Missouri, in reference to this case?

A. Well, I didn't remember.

Q. At Des Moines the other day wasn't you asked regarding Trenton, Missouri?

A. Well, I had here some lists at Des Moines. There isn't any Trenton on them.

Q. What is that?

A. There isn't any Trenton on them.

Q. Were you asked with reference to Trenton cars at Des Moines?

A. Well, I don't remember.

Q. Is that the full list of all the cars that were phoned or is there some missing? Was there some cars missing?

A. No; there is just four sheets.

Q. Well, I know, but does that contain all of the cars that he phoned you or about, or is it part of the cars?

[fol. 52] A. That is all of them.

Q. How many cars did he 'phone you about that day?

A. Well, there is nine the first time and ten the second.

Q. And you now state that Mr. Hope did not inform you that in the first drag there were not cars for Trenton, Missouri?

A. He surely did not, or I would have had it down here.

Q. Did you ever receive the manifests that he 'phoned you about?

A. I never did.

Q. Do you know what became of them?

A. Well, I couldn't say. I suppose it was burned in his caboose.

Q. When the caboose was wrecked?

A. Yes, sir.

Q. Did he 'phone you at any time with regard to five cars for Topeka, Kansas?

A. No, he did not.

Q. Did you later learn there were five cars for Topeka, Kansas?

A. No; I never knew about it.

Q. Did Mr. Armstrong, the claim agent, call to see you in regard to the manifests and shipments of these cars?

A. He called at the depot in regard to the manifests.

Q. Did he obtain them from you?

A. Yes, sir.

Q. When?

A. Well, I couldn't say; it was some time after the accident.

Q. How long after the accident?

A. I couldn't say.



[fol. 53] Q. Less than a month, wasn't it, after Mr. Hope was killed?

A. I can't remember.

Q. Well, can you tell us within a year?

A. Oh, yes; it was, I suppose, within a month or two, something like that.

Q. Now, these two cars for St. Joe, Missouri, that were taken out of the mine that morning, later went to St. Joe, Missouri, did they?

A. Yes, sir; I billed them that way.

Q. Billed them when?

A. I billed them to St. Joe that day.

Q. You billed them to St. Joe that day after receiving the 'phone from Mr. Hope?

A. Yes, sir.

Q. And they were taken out in the usual course of business for St. Joe, Missouri?

A. Yes, sir.

Q. Now, as I understand it, these loaded cars are at the mine—they are loaded at the mine?

A. Yes, sir.

Q. And then through the manifests are delivered to the conductor.

Mr. Stringer: I object to that as leading.

Mr. Davis: Oh, it is, but it is merely ordinary work.

Q. Well, are the manifests delivered to the conductor at the mine?

A. Yes, sir.

Q. And then in the course of transporting these loaded cars, where are they taken after the manifests are handed them at the mine?

A. Pershing yard.

Q. And then are there other places in furtherance of their transportation on some tracks at Pershing yard?

[fol. 54] A. Yes, sir.

Q. And those going west was placed on track one?

A. Yes, sir.

Q. So that a car, or loaded car for St. Joseph, Missouri, would be placed on track one in the usual course of the Company's business?

A. Yes.

Q. That is all.

Cross-examination.

Mr. Stringer:

Q. Miss Hanlon, you live at Williamson?

A. Yes, sir.

Q. Williamson is how far from Pershing?

A. Well, I suppose about three and a half miles.

Q. There is no station at Pershing.

A. No station.

Q. But all the work is handled from Williamson.

A. Yes, sir.

Q. And when any cars are brought up to Pershing from these mines, the usual practice is for the conductor to 'phone you, giving you what cars he has brought up.

A. Yes, sir.

Q. Is that right? Then you later receive the manifests?

A. Yes.

Q. From Chariton.

A. Yes, sir.

Q. Two drags were brought up the morning of this accident?

A. Yes, sir, two.

[fol. 55] Q. The first drag came in about 9:30?

A. Yes, sir.

Q. And the second about 11:30?

A. About 11:50, I think.

Q. 11:50. And on each of those occasions Conductor Hope 'phoned you and told you of the cars he had brought up?

A. Yes, sir.

Q. And where they were billed for?

A. Yes, sir.

Q. Or were to be billed for. And you at that time wrote down what he told you?

A. Yes, I did.

Q. Now, have you, or did you write down on both those occasions what it was that he told you, on both drags?

A. Yes, sir.

Q. Will you give me the slip which covers the first drag?

(Yellow slip of paper with figures on it marked defendant's Exhibit "A.")

Q. I show you defendant's Exhibit "A," that is, as I understand it, the record which you made at the time of your telephone conversation with Mr. Hope, when he came up with the first drag?

A. Yes, sir.

Mr. Stringer: I offer it in evidence.

Mr. Davis:

Q. You claim it is the St. Joe car?

A. Yes, sir.

Mr. Davis: No objection.

Mr. Stringer:

Q. Did you keep a memorandum of the conversation of the cars that came in on the second drag?

A. I did.

[fol. 56] Q. Have you that with you?

(Three yellow slips with figures on them marked defendant's exhibit "B.")

Q. I show you defendant's exhibit "B," that is, as I understand it, the memorandum which you made of the cars that came in under the second drag?

A. Yes, sir.

Q. And does that truly show the numbers of the cars and where they were destined for?

A. It does.

Q. And did you, pursuant to that, bill the cars to those destinations?

A. I did.

Mr. Stringer: Offered in evidence,

Mr. Davis: No objection.

Mr. Stringer:

Q. Now, taking these exhibits, Miss Hanlon, will you read into the record the numbers of the cars and the places to where they were billed on the first drag?

A. The car numbers and their destinations?

Q. The car numbers and the destinations of the cars that came in on the first drag.

A. Rock Island 87413, Valley Junction, Iowa; Rock Island 86038, Valley Junction, Iowa; Rock Island 89252, Allerton, Iowa; M. W. S. 191, Allerton; Rock Island 82499, Allerton; L. A. M. 77906, Allerton; Rock Island 88243, Valley Junction.

Q. Would you speak a little louder? I am afraid the jury is not hearing.

A. L. A. M. 62565, St. Joe, Missouri; K. C. S. 27783, St. Joe, Missouri.

Q. Now, that is the list of the cars that came in the first drag at 9:30?

[fol. 57] A. Yes, sir.

Q. Would you take the list that you made with respect to the cars that came in at 11:50 on the second drag and read into the record the numbers of those cars?

A. Rock Island 99271, Allerton, Iowa; Rock Island 1000221, Valley Junction; Rock Island 98251, Valley Junction; V. G. N. 15533, Valley Junction.

Q. Valley Junction is where?

A. Iowa. Rock Island 87021, Valley Junction, Iowa; Rock Island 82785, Valley Junction, Iowa; Rock Island 82324, Valley Junction, Iowa; Rock Island 84220, Valley Junction, Iowa; Rock Island 84322, Valley Junction, Iowa; Rock Island 99750, Valley Junction, Iowa.

Q. There were then, as I understand it, no cars in the second drag destined outside of the State of Iowa?

A. No, sir.

Q. That is all.

Mr. Davis: That is all. Oh, no, just a moment, Miss Hanlon.

Redirect examination.

Mr. Davis:

Q. When Mr. Hope went into Chariton, did he call you up over the 'phone?

A. He gave me that billing.

Q. Well, when he went into Chariton he had a talk with you about going into Chariton for water, did he?

A. At the time he gave me that billing I asked where he was going for dinner and he said to Chariton.

[fol. 58] Q. Did he not tell you he was going for water?

A. No; he said he was going in to dinner.

Q. Did he not tell you that he was going for water to Chariton?

Mr. Stringer: Objected to as hearsay.

The Court: Objection sustained.

Mr. Davis:

Q. In talking to Mr. Hope, you may state—not state what was said but what learned from him what he was going to do after he went to Chariton and got his dinner. Just answer that yes or no.

Mr. Stringer: Objected to as hearsay.

The Court: She may answer that yes or no.

A. Well, I couldn't hardly answer it yes or no.

Mr. Stringer: I don't believe the question could be answered that way.

Mr. Davis: That is all.

The Court:

Q. I didn't clearly understand from what point you received the telephone conversation when you took that memorandum here in defendant's Exhibit "A" and "B." From what point?

A. Pershing, Iowa.

Mr. Stringer:

Q. That is, Mr. Hope was talking at Pershing?

A. Yes, sir. I was at Williamson and he was at Pershing.

Mr. Davis:

Q. In this talk which you had with regard to these cars in Exhibit "B," was that the same talk and a part of the same conversation that you had with reference to what Mr. Hope was going to do?

[fol. 59] A. At 11:50; yes, sir.

Q. And Mr. Stringer has inquired with reference to a part of that conversation, with regard to the destination of these cars, has he not?

A. I don't understand.

Q. Mr. Stringer has asked you with regards to a part of the conversation you had with Hope at that time?

A. I don't think Mr. Stringer ever did.

Q. With reference to now, I mean, today here in court.

A. Oh, yes.

Q. And you have been testifying in response to questions from him with reference to part of the conversations you had with Hope at 11:30, with regard to these cars?

A. Yes, sir.

Q. Was all the talk you had with Hope with reference to the carrying on of the Company's business, that is, with reference to work being done?

A. Part of it.

Q. And was it customary for the conductor to inform you as to what work he would proceed to do if he went to a certain station and then came back?

A. No, sir.

Mr. Stringer: That is objected to as——

Mr. Davis: That is all, I think.

Q. Oh, just one other question, Miss Hanlon, if you will pardon me. Do you know the station known as O. D. 27 on the Rock Island line?

A. That is Pershing, Iowa.

Q. How?

A. Pershing.

[fol. 60] Q. That is the Pershing yards. That is the station at which orders are received by trainmen in the handling of the trains, is it not, by telephone or otherwise?

A. By telephone.

Q. And it is listed on the Rock Island lines as O. D. 27?

A. Yes, sir.

Q. What did you mean, when Mr. Stringer, in saying that it wasn't a station?

A. Why, they don't call it a station; no trains stop there; it is just a yard.

Q. Is O. D. 27 a number of and an initial of a station? You just said it was.

A. Well, I suppose it is for the conductors' benefit where they pick up.

Q. Well, it is for the benefit of the conductor and the Company's business?

A. I suppose it is.

Q. In other words, there is no depot there?

A. No, sir.

Q. There is a telephone station there?

A. There is a telephone station there.

Q. And that is listed on the books as O. D. 27, and at that station or place orders are transmitted to the men at that point as to what they shall do and as to how they shall move on the tracks?

Mr. Stringer: I object to the question as extremely leading.

The court: Objection sustained.

Mr. Davis:

Q. Are orders transmitted to those men?

A. Yes, they are.

Q. In what way?

[fol. 61] A. On the telephone.

Q. By whom?

A. Dispatcher.

Q. The train dispatcher?

A. Yes, sir.

Q. Do those orders have reference to the movement of trains both there and on the main line?

A. On the main line.

Q. And also with reference to the movement of those trains at Pershing, do they not, as to what they shall do with them?

A. Well, they always know what to do at Pershing, but when they come out on the main line they have to get orders from the dispatcher.

Q. That is, at that point, O. D. 27, is the point at which they receive or transmit information to the dispatcher?

A. Yes, sir.

Q. I think that is all.

FRED A. ELDER, called and sworn as a witness in his own behalf, testified as follows:

Mr. Davis:

Q. You may state your full name.

A. Fred A. Elder.

Q. How old a man are you, Mr. Elder?

A. Thirty-eight years old.

Q. Married?

A. Yes, sir.

Q. Have a family?

A. Yes, sir.

[fol. 62] Q. How many children?

A. Four children.

Q. And your home is at Chariton, Iowa?

A. Yes, sir.

Q. You were formerly employed, I believe, as a brakeman by the Rock Island Railway?

A. Yes, sir.

Q. Working as a brakeman in its work around Chariton, Iowa?

A. Yes, sir.

Q. How many years you been employed as a brakeman?

A. Almost nine.

Q. During how many years previous to this accident had you worked in the work of switching these mines near Pershing siding?

A. Almost four years.

Q. Or Pershing yards?

A. Yes, sir.

Q. And who was during that time your conductor most of the time?

A. Conductor Hope.

Q. C. Y. Hope?

A. Yes, sir.

A. And during those four years did you work practically steady at those mines?

A. Yes, sir.

Q. Now, then, in working at those mines, about how many times a week would you switch those mines?

A. Well, we switched the mines ever time that the mine has work there, and if they had too many rains, why we would have to work the idle days in order to catch up.

[fol. 63] Q. And some days is what would be known as idle days then, and in switching those mines your conductor—do you know from your experience from whom your conductor would get the manifests?

A. Yes, sir.

Q. From whom?

A. He would get it from the way boss at the mine.

Q. Now, when you went down to switch a mine, as you call it, do you know what the custom was as to taking all the loads each time?

A. Yes, sir.

Q. What was that custom? To take them out and designate them where they went—take out all the loads that were at the mines?

A. Yes, sir.

Q. And regardless of whether they went in or out of the state?

A. Yes, sir.

Q. And when you took those loads out, where would you put loads, both intrastate and interstate, going west?

A. The St. Joe cars and such as that on number one track.

Q. And where were—would you put intrastate and interstate cars going east on number—

A. On number two track.

Q. Now, then, during the time that you were working, you may state to the jury whether or not in handling these cars at the mine any distinction was made between cars going out of or into the state?

A. No, sir.

[fol. 64] Mr. Stringer: Objected to as irrelevant and immaterial.

The Court: Overruled.

Mr. Davis:

Q. And you may state whether or not that day you handled cars both for—for points both into and out of the state of Iowa?

A. Yes, sir.

Mr. Stringer: Objected to as no foundation laid, calling for a conclusion.

Mr. Davis: Why, you conceded that there were cars for St. Joe and for Valley Junction, Mr. Stringer.

Mr. Stringer: Well, I conceded that he handled those cars, if that is what you are getting at.

Mr. Davis: I will withdraw it and frame it this way.

Q. You may state to the jury whether or not you handled cars both for St. Joe, Missouri, and for Valley Junction and Allerton, Iowa?

A. Yes, sir.

Q. And in handling those cars, you may state to the jury whether or not any distinction was made as to whether you were hauling cars for St. Joe at one time and for points in Iowa at another time?

A. No, sir.

Q. Or whether the work was co-mingled?

A. No, sir.

Mr. Stringer: Objected to as irrelevant and immaterial.  
The Court: Overruled.

Mr. Davis:

[fol. 65] Q. Now, then in hauling the cars, when you went down to the mines, I wish you would tell the jury what the first work was with reference to any cars.

A. The first work we got a train out from number two.

Q. And what did that train consist of?

A. It consisted of cars going to St. Joe, Allerton and Valley Junction.

Mr. Stringer: I object to stating where they were going to. If you intend to deviate from that——

Mr. Davis: I assure you we intend to deviate.

Mr. Stringer: Well, I object to the statement of this witness as to where any cars were going to, on the ground there was no foundation laid.

The Court: That is on the first load?

Mr. Davis: Yes, Now, then——

Mr. Stringer: The first load, yes.

Mr. Davis:

Q. Now, then, did you switch any on the mine that those come from?

A. Number two mine.

Q. Did you do any switching at number three mine?

A. Yes, sir.

Q. What switching did you do at number three mine that morning?

A. We got a train of coal there.

Q. How many cars?

A. There was nine cars.

Q. What did you do with them?

A. Brought them to the main line and put on two track and one track.



Q. Did you switch any at number one that day—number one mine?

A. No; number one mine isn't working.

[fol. 66] Q. Did you switch any cars from Topeka, Kansas, that day?

Mr. Stringer: Objected to as calling for the conclusion of the witness and no foundation laid.

Mr. Davis: Withdrawn.

Q. I wish you would state to the jury whether or not you switched five cars there that were not taken to tracks one and two.

A. Yes, sir; we pulled five cars down on number one load track and number two mine, the conductor said, was Topeka, Kansas.

Mr. Stringer: I object to that as hearsay and move to strike the latter—portion of the answer out.

The Court: Motion granted.

Mr. Davis:

Q. Did you haul any of those five cars out or take them from number two or leave them pulled out of the mine part way?

A. We left them to clear out number one load track at number two mine.

Q. Do you know where those cars were going?

A. Yes, sir.

Q. Where?

Mr. Stringer: That is objected to as no foundation laid and calling for the conclusion of the witness.

The Court: I think the witness should qualify himself.

Mr. Davis:

Q. Well, did you see the manifests for those cars?

A. I saw that that was the manifest of—the conductor had it and he told me they were going—

Mr. Stringer: I move to strike out the answer.

The Court: Strike out what the conductor told you.

[fol. 67] Mr. Davis:

Q. How, in the usual course of the conductor's business did he show you where cars were going?

A. From the manifests.

Q. And did you see the manifests that day?

A. Certainly; I had to see it to do the work there.

Q. Was it part of your duty not to switch any of these cars—would you have a manifest given to you or a copy?

A. Yes, sir.

Q. On the manifests coming to you you would make lists of the cars and where going?

A. Yes, sir.

Q. When would you make those lists, as you took them from the tracks one and two?

A. As we was coming out the mines to the main line.

Q. And were these manifests handed to you by Mr. Hope?

A. Yes, sir; I looked them all over.

Q. Do you know what became of these manifests for the five cars?

A. They were in the train book. The evidently burned up when the car burned up.

Q. That were in that caboose?

A. Yes, sir.

Q. Do you know who put them in the train book?

A. Yes, sir; I put them in myself when I am—my switch list.

Q. Now, then, in handling those five cars, did you handle them in accordance with instructions from the manifests?

[fol. 68] A. Yes, sir. We pulled them down and tied them down and intended to bring thirteen cars out.

Q. Where did you tie them down?

A. Well, at the clear on number one load track.

Q. Tell the jury whether you would have any work to do with reference to those five cars?

Mr. Stringer: That is objected to as calling for the conclusion of the witness. He wasn't in charge of the car and the conductor was the man in charge, and it appears that the conductor worked from instructions from the dispatcher. Now, I object to that as a mere conclusion.

The Court: Objection sustained.

Mr. Davis: Exception. I am asking him——

The Court: Did that finish the question?

Mr. Davis: That is all.

The Court: Overruled.

Mr. Davis:

Q. You may answer.

Mr. Stringer: I want to get in there, if I may.

A. We had brought it out to the main line.

Mr. Stringer: That is objected to as irrelevant and immaterial and calling for the conclusion of the witness and no foundation laid. Might I ask a preliminary question?

Mr. Davis: Yes.

Mr. Stringer:

Q. The conductor was the one in charge of this crew was he not?

A. He was in charge of the crew, yes, sir.

Q. And you would take your orders from him?

A. Yes, sir.

Q. And he would act on orders from the dispatcher?

A. Yes, sir, as far as running and handling the train over the road, yes.

Mr. Stringer: That is objected to as no foundation laid, calling [fol. 69] for the conclusion of the witness and irrelevant and immaterial.

The Court: Same ruling.

Mr. Davis:

Q. You may answer. Did you have any work to do with those cars?

A. Yes, sir; we had to finish cleaning out the mines, and put in empties yet.

Q. Do you know from your custom of doing the work, had you completed the work that day?

A. No, sir.

Q. You may state whether or not you had hauled all loads out of the mine that day before the accident.

A. No, sir. Left loads at number two and left loads at number three mine and had instructions——

Mr. Stringer: I move to strike out the instructions.

The Court: Motion granted.

Mr. Davis:

Q. You may state whether or not you placed all empties in that mine you had?

A. We hadn't put any empties in at all at number three mine.

Q. When you placed those empties there, they were placed in the mine for the purpose of loading?

A. Yes, sir.

Q. And afterwards they were hauled out for the purpose of unloading?

A. Yes, sir.

Q. Now, then, after you had switched these five cars from number two mine and tied them down on track one at the mine, did you get a drag of cars out of the mine?

A. At that time, yes, sir.

[fol. 70] Q. And how many?

A. I think there were eleven.

Q. And just tell the jury where you placed those cars.

A. We placed the St. Joe cars and the Allerton cars on number one track and the Valley Junction cars on number two track.

Q. And after placing them on track one and two, did you go back and get another drag?

A. We went back to number three mine.

Q. And did you get a drag there?

A. Yes, sir, we did.

Q. How many cars?

A. Nine.

Q. And tell the jury what you did with those?

A. We put the Valley Junction cars on number two track and shoved the Allerton cars down against the St. Joe cars.

Q. You went down and got a second drag of cars?

A. Yes, sir.

Q. And there were cars there for Allerton and Valley Junction?

A. Yes, sir.

Q. Now, Allerton is east or west?

A. West.

Q. Then would those cars be placed on the same track as the St. Joe?

A. Yes, sir.

Q. And the Valley Junction would be placed on the east track?

A. Yes, sir.

Q. Now, after placing the cars, I wish you would tell the jury how you placed them when you left that last drag, what cars, if you [fol. 71] can remember, you first placed on two and then on one and so on.

A. We put away these cars on number two track, shoved them in and tied them down——

Q. How many cars did you have to place on number one track in that last drag?

A. We had one.

Q. And when you shoved in on number one track, then tell the jury what you did with reference to the movement of any of the cars on the track?

A. We tied into the St. Joe cars and Allerton cars.

Q. Tied—what do you mean?

A. Make a coupling.

Q. Who coupled the Allerton car to the St. Joe car?

A. I did myself.

Q. And there was two St. Joe cars?

A. Yes, sir.

Q. And then after coupling them, what was done?

A. We shoved them down to clear number two track to Pershing yards.

Q. You shoved the Allerton cars and the St. Joe down to number two track towards the west?

A. Yes, sir.

Q. And after shoving them down, how far do you say they were shoved?

A. Six or eight car lengths.

Q. What was then done with reference to the cars?

A. We set the brakes on them.

Q. And who set the brakes?

[fol. 72] A. I and Mr. Decker.

Q. Tell the jury how that was done.

A. Mr. Decker would tie the rear end of the train down when he would stop and I would bust the air on the front car.

Q. Explain to the jury what you mean by busting the air?

A. Just break the air hose that would throw the brakes in emergency, and he started at the rear end and I would start at the end of the engine.

Q. In setting the brakes, as I understand it, you climbed up the side of the car near the end on what is known as hand holds?

A. Yes, sir.

Q. And then the brake is situated about the center of the car?

A. On the end of the car.

Q. The center of the end,—is that right?

A. Yes.

Q. Now, then, you got up at the front end of the car next to the engine?

A. Yes, sir.

Q. And what car did you set the brakes on after they had been stopped about six car lengths to the west?

A. I set the brakes on the loaded cars.

Q. Now, what were those?

A. On was Allerton, two St. Joe, and the other four Allerton behind them.

Q. You set the brakes on three cars?

A. I set the brakes on three cars ahead of the cars that I know.

Q. That was the Allerton cars and the two St. Joe cars?

[fol. 73] A. Yes, sir.

Q. And then do you know from your custom of doing work there whether or not these cars would be left there or whether they would have to be shoved to the west end of one?

A. We would have to shove them to the west end when we would come back after dinner.

Mr. Stringer: I move to strike out the answer as irrelevant and immaterial, on the ground that that statement about coming back after dinner—

The Court: I think the answer states a conclusion. He may state what the work was.

Mr. Davis:

Q. Will you state what work you had to do with reference to these cars that was there after you pushed six car lengths down the track?

Mr. Stringer: That is objected to as calling for a conclusion.

The Court: Overruled.

Mr. Davis:

Q. Now, what was the purpose of shoving them to the west end of the—to the west?

Mr. Stringer: Same objection.

The Court: Same ruling.

A. We shoved them to the west end of number one track.

Mr. Davis:

Q. And do you know from your experience in the manner and custom of doing the work whether or not before finishing the work you would have to have those cars at the west end of one?

A. Yes, sir; that was always the instructions.

Q. After you had set the brakes on these St. Joseph cars, you may state whether or not you uncoupled the engine from those cars from the end of the string?

[fol 74] A. Yes, sir.

Q. And then what did you do?

A. We got our caboose.

Q. And where did you go?

A. We started for Chariton.

Q. And what was the occasion of your going to Chariton?

A. For water and dinner.

Q. And water for what?

A. Water for the engine.

Q. Now, then, how did you ascertain you had to have water for the engine?

Mr. Stringer: That is objected to as irrelevant and immaterial, calling for the conclusion of the witness, doesn't appear that this witness had anything to do with the operation of the engine.

The Court: Objection sustained.

Mr. Davis:

Q. You may state whether or not you were acquainted with the engineer?

A. Yes, sir.

Q. You may state whether or not he said anything relative to water for that engine?

Mr. Stringer: Objected to as hearsay.

The Court: What the engineer said is hearsay.

Mr. Davis: An engineer in charge of the engine of the Company, does the court hold that is hearsay?

The Court: Objection sustained.

Mr. Davis: Well, we ask this question then.

Q. You may state what the engineer said with reference to getting water for that engine?

Mr. Stringer: Objected to as hearsay.

The Court: Objection sustained.

[fol 75] Mr. Davis: We offer to show by this witness——

Mr. Stringer: I think counsel ought to make his offer in private. I don't know what it is going to be, but——

Mr. Davis:

Q. Now, Mr. Elder, after you cut off onto the caboose where were you going, you say?

A. Chariton.

Q. Chariton, Iowa. And on the way in did you have to go on the main line track?

A. Yes, sir.

Q. And while you were going in did a collision occur?

A. Yes, sir.

Q. I wish you would tell the jury what happened to you, as near as you can, at that time?

A. Well, as near as I can tell, I was all mashed up.

Mr. Stringer: Well, I move to exclude that as a mere conclusion.

Mr. Davis: I don't think it is.

The Court: You may strike the answer. Tell just what took place.

Mr. Davis:

Q. Just tell what happened to you.

A. Well, on the way in we were struck by a passenger train running between Minneapolis and Kansas City, known as 69, through that part.

Q. And what became of you, if you can remember?

A. Well, when I came to, I was in the hospital.

Q. How long afterwards before you came to?

A. Well, it was Wednesday afterwards, or along in there.

[fol. 76] Q. And you were hurt on a Sunday, were you?

A. Yes, sir.

Q. Now, then, when you came to, you may tell the jury whether or not you had any burns on your back?

A. Well, the first I can remember, they had me in some position and I asked them what they were doing and they said they were picking cinders out of my back.

Q. And who nursed you?

A. Miss Ida Price.

Q. And what hospital were you taken to?

A. Yokum & Yokum at Chariton. They are physicians of Chariton. I think they are known as the Rock Island physicians there.

Q. Rock Island doctors there?

A. Yes, sir.

Q. Mr. Elder, during the time you were working generally, say the year previous, I wish you would state what your average monthly earning were?

A. Average amount, \$240.00 to \$-50.00 a month.

Q. And were you in good health before you were hurt?

A. Yes, sir.

Q. Did you work regularly?

A. Every day.

Q. Now, then, how long did you remain in the hospital?

A. I was there just five weeks, I think.

Q. Five weeks?

A. At that one particular place.

Q. And during that time you may tell the jury whether you suffered any pain?

[fol. 77] A. Yes, I suffered all the time; suffer yet.

Q. Now, this pain, describe it, if you can, to the jury.

A. Well, it is in my spine and through my chest and in my head.

Q. It is in your spine and through your chest and where?

A. And in my head.

Q. While you were in the hospital, you may state to the jury whether or not you suffered from headaches?

A. Yes, I suffered from headaches.

Q. And you may state to the jury whether or not you are bothered now with headaches?

A. Yes, sir, I am.

Q. Describe the location, as near as you can, of those headaches.

A. Well, the pain is really sharp pains up through the back of my head and over the top, then in through here (indicating).

Q. You are pointing at the lower part of the forehead, between the eyes, just above the breech of the nose?

A. Yes, sir.

Q. Now, then, with reference to your ribs, did you sustain some broken ribs?

A. Yes, sir.

Q. And does that cause you pain now?

A. Yes, sir, they do.

Q. Describe that to the jury.

A. I have sharp shooting pains around me from those injuries. When I take a deep breath I have something that hurts me in here, something that feels like it slaps me. I don't know what it is. [fol. 78] Q. Mr. Elder, did you suffer any injury to you back, in addition to your ribs?

A. Yes, sir.

Q. Now, then, from the time of the injury to the present time, you may state whether or not you suffered pain where your ribs were fractured?

A. Yes, suffered pain where my ribs was fractured.

Q. And what did you weigh at the time you were hurt?

A. I weighed 183 the last time I was weighed.

Q. Were you weighed recently?

A. I was weighed just a few days before this accident.

Q. Well, I say now, since, before this trial, have you been weighed?

A. Yes, I was weighed just the other day.

Q. What did you weigh then?

A. 157.

Q. And with reference to your back and the pain in your back, you may tell the jury whether that pain has been continuous from the time of the injury to the present time?

A. Yes, sir, it has.

Q. And how has it affected you with regard to your sleep?

A. Well, I don't sleep, that is, to lay down and to sleep; I probably lay in bed until three or four o'clock in the morning before I go to sleep, and then I will sleep about three or four hours.

Q. Were you ever affected that way before this injury?

A. No, sir.

Q. And does that injury to your back and this pain cause you to wake up at night?

[fol. 79] A. Yes, sir; I wake up with jerks in my back.



Q. Is that painful?

A. Yes sir.

Q. Before you were hurt, were you ever troubled that way?

A. No, sir.

Q. How old a man are you?

A. Thirty-eight years old.

Q. And when were you thirty-eight?

A. I was thirty-eight the 14th day of last March.

Q. And you will be thirty-nine this coming March?

A. The 14th day of this month; yes, sir.

Q. Mr. Elder, since your injury, have you tried to walk?

A. Yes, I try to walk, but I don't have much luck.

Q. Well, in what way does it affect you in walking?

A. Well, my legs become numb and I am out of breath and my back hurts me when I walk with my back moving.

Q. I notice you stoop one shoulder down. Can you walk as you usually did, with your shoulders straight up?

A. I don't seem to have any strength along my left side.

Q. How far can you walk without having to stoop?

A. Well, six or seven blocks is about as far as I can go.

Q. Before the injury were you strong and able-bodied?

A. Yes, sir.

[fol. 80] Q. And did the general work of a switchman every day?

A. Yes, sir.

Q. And did that work consist of climbing up and down box cars and walking about and throwing switches and uncoupling cars?

A. Yes, sir; caused me to climb two or three hundred cars a day up and down.

Q. And was that work what you would call hard manual labor?

A. Yes, sir; known as the hardest job on that division.

Q. Now, then, with reference to your back, while you were in the hospital, you may state whether the doctors did anything for your back?

A. Yes, they did all they could. They couldn't do much, on account of my burn.

Q. Later on, tell the jury whether or not you were given any brace or cushion or corset for your back?

A. Yes, sir.

Q. Who gave that to you?

A. Well, I got it from one of the doctors' brother-in-laws.

Q. What doctor's brother-in-law?

A. Doctor Yokum.

Q. Doctor Yokum. And when did you get that?

A. Well, I don't know just the time. It was shortly after I could get so I could walk around with assistance.

Q. And have you had to wear that practically ever since?

A. Yes, sir.

Q. Can you move about without it?

[fol. 81] A. Not any——

Q. Does this to some extent assist you in moving about?

A. Yes; it holds me up.

Q. Will you describe that, if you can, so the jury will——

A. Well, it is a big—you might say it is a big corset.

Q. Well, can you unbutton your vest and show it, if you will just? (Witness unbuttons his clothing.)

Q. Now, this corset is a brace that goes clear around your body?

A. Yes, sir.

Q. And I notice it is buckled at the front with four or five elastic straps, sort of a suspender strap,—is that correct?

A. Yes, sir.

Q. And about how far down—it is about up to or at least above the nipples of your breast.

A. Yes, sir, and it runs up under my arms.

Q. And it runs up under your arms, about the arm pits, does it?

A. Yes, sir.

Q. And running down, it runs down how far towards your hips?

A. Right to my hips.

Q. And then at the back does it run off to a point about two and a half to three inches below the neck, the bottom of the neck?

A. Two strap irons.

Q. And are those strap irons over your shoulder?

A. No, sir; they are fastened around the arm and over my shoulder and around my body down here (indicating).

[fol. 82] Q. Now, then, this brace—can you stand up a moment? (Witness stands up.) Just turn your back. You can take off your coat, can you?

(Witness takes off his coat.)

Q. Now, this brace consists of two iron straps which run within about two and a half inches of the top of your spine, is it?

A. Yes, sir.

Q. And runs downward, clear down to below the bottom of the spine,—is that correct?

A. Yes, sir.

Q. And have you had to wear that ever since it has been given to you, Mr. Elder?

A. Yes, sir.

Q. And has there been a day since you have been injured that you haven't suffered pain as the result of this injury to your back?

A. No, sir; there have not.

Q. Mr. Elder, in regard to your being unconscious, have you ever suffered from dizzy spells since that time?

A. Yes, sir; I do yet.

Q. And with reference to the dizzy spells, I wish you would describe that to the jury.

A. Well, I get a jerk or jam, I would be walking and my foot slips, jams together and then I go dizzy.

Q. And were you ever troubled that way before?

A. No, sir.

Q. Now, Mr. Elder, with reference to pain, have you suffered any pain in your pelvic region down here?

A. At the back, I do.

[fol. 83] Q. Whereabouts in the back? Just describe that to the jury.

A. Well, just about along where you have your hands.

Q. Well, that would be at the lower part of your back, where the hips—between the hips and the lower part of the spine?

A. Yes, sir.

Q. And describe that pain to the jury.

A. Well, that is just a gradual pain all the time.

Q. Were you X-rayed by the doctors?

A. Yes, sir.

Q. Did they tell you you had a fracture of the pelvis?

A. Yes, sir.

Mr. Stringer: Objected to as hearsay.

Mr. Davis: Withdrawn. Will you have your doctor here?

Mr. Stringer: What doctor is it?

Mr. Davis: The doctor that took those X-rays of his pelvis.

Mr. Stringer: Well, I don't know who he is, but I don't expect to have him here.

Mr. Davis:

Q. Was he the company doctor?

A. Yes, sir.

Q. What was his name?

A. Doctor Yokum.

Q. Still in their employ?

A. Well, I couldn't say as to that.

Q. Now, Mr. Elder, since this accident, have you to the present time tried to get along and better yourself?

A. Yes; I have tried everything

Q. And have you done any massaging for your back?

[fol. 84] A. I took electric treatments.

Q. Well, how long did you take electric treatments?

A. Well, I took them along in the summer. Didn't seem to do me any special benefit.

Q. And with regard to walking, Mr. Elder, have you any difficulty in walking since you were hurt?

A. Yes, I do.

Q. Well, tell the jury in what way you are affected in walking.

A. Well, my feet become numb when I walk *anw* distance, and then my hips, I couldn't—

Q. Well, in what way does it affect your feet?

A. Well, I have to force my feet to go.

Q. Tell the jury in what way and why. We have to have this in the record, Mr. Elder. It comes—well, I don't know exactly how to explain it. It is labor to make my feet travel.

Q. Before you were hurt, in walking along were you ever affected that way, or afflicted?

A. No; I wasn't affected in any way.

Q. In walking, were you affected with any numbness, with numbness of your feet or having to draw your feet?

A. No.

Q. Which side of your leg or foot is it that this difficulty is?

A. Well, my left one is the worst. They both bother me.

Q. That is all?

Mr. Stringer: No cross-examination.

The Court: We will take a recess until half past one.

Mr. Davis:

Q. Just take the stand a moment, Mr. Elder, you may state to [fol. 85] the jury what the last work you did with regard to any of those coal cars. Was it before you started for Chariton?

A. We shoved them down about seven car lengths on number one track, the St. Joe car and the Allerton.

Q. Did you set the brakes on the St. Joe car?

A. Yes, sir.

Q. Was that the last thing you did with reference to the movements of the St. Joe car?

A. Yes, sir.

Q. And then you moved on to Chariton?

A. Yes, sir.

Q. And on your way into Chariton you were injured?

A. Yes, sir.

Q. That is all.

Mr. Stringer: That is all.

IDA PRICE, called and sworn as a witness for and in behalf of the plaintiff, testified as follows:

Mr. Davis:

Q. You may state your full name?

A. Ida Price.

Q. And, Miss Price, are you a nurse?

A. Yes.

Q. And were you formerly a nurse of Mr. Elder's at Chariton, Iowa?

A. Yes.

Q. Were you called to attend him on Sunday, in February the 4th, 1923?

A. Yes.

Q. When you arrived at the hospital, I wish you would tell this [fol. 86] jury the condition of Mr. Elder. Just tell them in what condition you found him.

A. I found him in an unconscious condition.

Q. What time of night was that?

A. Seven o'clock.

Q. Now, just describe his body, as to any burns or marks or anything of that kind.

A. He had a first degree burn from here up to here.

Q. Now, what do you mean, from his hips up toward the pit of the arm?

A. Yes. Half way between the knee and the hip joint the burn extended up. That was on the back.

Q. Was there any marks on his head, or bruises?

A. Yes.

Q. Just describe those to the jury.

A. Severe bruise on the left side of the head.

Q. Any had any blood come from that?

A. Yes.

Q. The blood showed from the hair or the marks, did it?

A. Yes.

Q. Was there any broken ribs that you know of, or did you ascertain that?

Mr. Stringer: That I think is objected to as incompetent.

Mr. Davis:

Q. Did you notice any marks along the ribs?

The Court: She may answer.

A. I did not, because that wasn't—

Mr. Davis:

Q. Were you present when anything was done for his ribs?  
[fol. 87] A. Yes.

Q. What was done? Just tell the jury.

A. Well, on Wednesday after the accident, Doctor Yokum put adhesive straps, on the left side, Doctor Yokum, Sr., and an hour afterwards Doctor Yokum, Jr., come in and took them off because it made it so difficult for him to breathe.

Q. Now, with reference to his back—how long did you attend him in the hospital?

A. Five weeks at the hospital.

Q. Five weeks at the hospital, and after he was out of the hospital did you attend him at his home?

A. Yes.

Q. How long?

A. Just one day of being the two weeks at home.

Q. And were you employed by the Rock Island Railroad to attend him?

A. Yes.

Q. Now, Miss Price, with reference to his condition in the hospital and pain in his back that he has testified to, in the small of the back, you may tell the jury whether or not he complained of pain at all times while you were attending him in the hospital.

A. Yes.

Mr. Stringer Objected to as incompetent.

Mr. Davis: Withdrawn.

Q. You may testify whether he showed any signs of pain in his back.

Mr. Stringer: Same objection, your Honor, and calling for a conclusion.

The Court: Any visible signs?

Mr. Davis: Withdraw that.

[fol. 88] Q. What did he do in the hospital? How did he rest? Just tell the jury that.

A. He didn't rest.

Q. What did he do? Just describe that to the jury. They want to know just how he acted in the hospital; how it affected him, these injuries.

A. Well, he had no rest except under the opiate, morphine. We gave him a hypodermic.

Q. State whether or not he groaned?

A. Yes.

Q. And with regard to his back, and the burns on his back, state whether or not any ulcer came out on his back?

A. Five.

Q. And how long did those ulcers continue on his back?

A. The one was still open when I left him—seven weeks.

Q. One ulcer was still open?

A. Yes.

Q. And those ulcers run?

A. Yes.

Q. Do you know whether they were painful?

—, —, —.

Mr. Stringer: Objected to as calling for the conclusion of the witness.

The Court: She may answer.

Mr. Davis:

Q. Do you know whether they were painful?

A. Yes; he complained of them very much.

Mr. Stringer: I move to strike out the answer.

The Court: Strike out the last part of the answer.

Mr. Davis:

Q. Now, Miss Price, from the time you saw him at seven o'clock [fol. 89] Sunday night, you say he was unconscious, when was the first time that you noticed he began consciousness?

A. It was a slight gaining of that on Wednesday for the first.

Q. On Wednesday. I think that is all.

## Cross-examination.

Mr. Stringer:

Q. He continued to improve under your treatment? The burn got well?

A. Well, yes.

Q. The ulcers cleared up, all but the one, when you left?

A. Well, the two, on the head and one on the back; there were two that were not healed when I left.

Q. The one on the head was not healed?

A. Was not healed.

Q. There was an ulcer there. That is all.

## Redirect examination.

Mr. Davis:

Q. While you were there, did Doctor Yokum prescribe this jacket, while you were attending him, or later?

A. No; that is, we didn't put it on him then.

Q. Did he have it—do you know when he got it?

A. No.

Q. That is all, Miss Price.

Mr. Davis: In view of the fact that negligence was admitted, Mr. Stringer, I would like to inquire now whether you make any claim of [fol. 90] contributory negligence or assumption of risk in this case?

Mr. Stringer: None.

Mr. Davis: The record may so show, that there is neither a claim of assumption of risk or contributory negligence.

Mr. Davis: Mr. Stringer, we now offer to read into the record from the American Experience Table of Mortalities the expectancy of life of a man thirty-eight years of age, showing that his normal expectancy is twenty-nine and sixty-two one hundredths years, and offer the same as evidence in this case. Any objection?

Mr. Stringer: What is that expectancy?

Mr. Davis: Twenty-nine and sixty-two one hundredths years.

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JOHN A. MCINTYRE, called and sworn as a witness for and in behalf of the plaintiff, testified as follows:

Mr. Davis:

Q. State your full name?

A. John A. McIntyre.

Q. Doctor, you live here in Owatonna?

A. Yes, sir.

Q. And are a licensed and practicing physician and surgeon?

A. Yes, sir.

Q. And have been practicing your profession for how many years?  
A. Since 1916.

Q. And located here during all that time?

[fol. 91] A. No, sir; I was in Davenport one year and two and a half years in the army; since that time in Minnesota, two and a half years here.

Q. And during the two and a half years in the army where were you?

A. Thirteen months of it in France and the rest at Camp Dodge.

Q. And you saw overseas service in France, Doctor?

A. Yes, sir.

Q. Now, Doctor, during your experience as a physician and surgeon and during your experience in the army, have you had occasion to examine men with injured vertebrae—injured spine?

A. Quite a few cases.

Q. And I will ask you if, at our request, last Saturday, in conjunction with Dr. Sheldrop, you examined Mr. Elder, the plaintiff?

A. I did.

Q. I wish you would detail briefly to the jury what you did in examining him, Doctor.

A. When we started the examination on this man, we went over him, what we call a physical examination, we started in at his head and his body and his extremities and examined on his head. He had a small scar over the right eye and another small scar over the occipital region, and that was all the external evidence of injury on the head. The eyes apparently all normal and nose and throat, and the chest—

Mr. Stringer:

Q. Anything said about the throat, Doctor?

A. Nose and throat were negative. The chest examination didn't [fol. 92] reveal anything wrong with the heart or the lungs, as far as we were able to make out at that examination, although externally, showed external evidence of old fracture of the ribs on the left side in the axillary line; practically all the ribs, so far as you could feel up and down the axillary line, there was evidence of old fractures or deformity that you could feel on external manipulation. The abdomen apparently was negative. But in the back, in the back region, there was a scar over about the first lumbar vertebra and in that region a considerable pain and tenderness. Now, this pain and tenderness extended down and up—up until about the fourth or fifth thoracic vertebrae, that is, about half way up in this area.

Mr. Davis:

Q. Test his reflexes?

A. And on the reflexes or extremities we didn't find any shortening in the legs, but on the reflexes, they were decreased at the time we examined him Saturday, there was a decreased knee reflex and no babinsky.



Q. Now, by a knee reflex is meant by putting the knee over the table——

A. To crossing your knee in this manner and hitting this nerve right under the knee cap, and there is a reflex there; if you are normal, you have a certain kick to your foot.

Q. That is, the foot comes up?

A. The foot comes up.

Q. And if it comes up quickly, it is exaggerated?

A. Yes.

Q. Now, the babinsky is by scratching the sole or foot?

[fol. 93] A. By scratching the sole or foot and you get a quick response on the toe.

Q. That is, there is a contraction?

A. There is a contraction of the big toe, and the big toe is the most important.

Q. And was that totally absent in this case?

A. That was totally absent in this case. And also when you do that as a part of that babinsky, some times you won't get a reflex here, but you will get one in this extensor group of muscles.

Q. What did that indicate to you?

A. There is an entire absence of that reflex.

Q. Now, there being an entire absence of that reflex, what did that indicate with reference to his physical condition, if anything?

A. That the are is entirely destroyed on that side.

Q. And did you examine the X-rays that Doctor Sheldrop had?

A. Yes, sir.

Q. Handing you exhibits one and six——

Mr. Stringer: Mr. Davis, before you go on, I don't know as these were formally offered in evidence.

The Court: They were not offered, Mr. Davis.

Mr. Davis: Well, I offered them in evidence.

Mr. Stringer: It is the understanding they are in evidence.

Mr. Davis: All right.

The Court: That is numbers one to seven inclusive?

Mr. Davis: Yes.

Q. Handing you exhibits one and six, will you examine those and state whether or not they show any fracture of this man's spine and vertebrae?

[fol. 94] Mr. Stringer: Which exhibit are you referring to?

Mr. Davis: Well, I am going to find out just as soon as he——

Q. And you are now holding in your hand exhibit six?

A. Well, this exhibit doesn't show the fracture of the——

Q. I think that is right.

A. Yes, this is the picture taken from the side of—from this way, the lateral picture.

Mr. Stringer: Which exhibit is this?

A. That is exhibit one. The first fracture of that vertebrae. You can see it is a fracture, because it is so much thinner than the rest of the vertebrae.

Q. Where is the first one?

A. Right there.

Q. This space here is less than the space between the other vertebrae?

A. No; the vertebra itself occupies less space and shows it has been pulled together in that manner.

Q. What effect does that have on the man's back and spine there?

A. Well, you would—I think there would be pressure on the cord at that place, and if there is enough pressure it will cause degeneration of the nervous tract.

Q. With reference to his condition of the back and spine and taking into consideration the physical examination you made, as well as what is disclosed by the X-ray, are you able to state whether or not he has sustained a fracture of the first dorsal vertebra?

[fol. 95] A. He has.

Q. State whether or not, from your convenience as a physician and surgeon, that is a permanent injury?

A. That is a permanent injury.

Q. And from the examination you have made of him, and assuming the condition you have found there, that he has worn this jacket and suffering pain from the condition, and also taking into consideration the condition as you found from the X-ray, in your opinion, will he ever be able to do manual labor?

A. Not heavy manual labor.

Q. Why?

A. Well, because he has got a loss of motor function to his—to these extremities, his lower extremities, which shows a degeneration at the present time. It is a question whether it will not progressively get worse.

Q. You may state from your experience as a physician and surgeon whether such conditions often do get worse?

A. They do.

Q. Does that tend to predispose one toward tuberculosis?

Mr. Stringer: Objected to as leading.

Mr. Davis:

Q. Well, what does this predispose one to?

A. Well, it causes simply a lessened—if there is a deterioration of this nervous tract, it simply deteriorates more and he will have less functioning of the nervous extremity.

Q. Do you find any impairment of feeling or numbness in his left leg?

A. He has practically the same sense, impairment of sensitiveness [fol. 96] over the entire trunk to this point. It is diminished, not entirely.

Q. And is that one of the evidences to an injury to the spinal cord?

A. Yes, sir.

Q. And could such an injury as he sustained bring about this condition, in your opinion?

A. It could.

Q. Doctor McIntyre, the testimony shows he has suffered from 1. adaches and dizzy spells from the time of the injury to the present time, and still suffers from that, and was unconscious from Sunday noon when he was injured until around Wednesday morning. In your opinion, what took place, as a physician and surgeon, what do you say took place to produce any unconsciousness?

A. Why, I would think that he probably had a concussion of the brain at the time of his injury.

Q. Does concussion of the brain produce unconsciousness?

A. It does.

Q. Lack of unconscious, is that a factor upon passing upon the character of the accident, the concussion, as a rule?

A. It is a rule; you would think it would be.

Q. I think that is all.

Mr. Davis: You may take the witness.

Cross-examination.

Mr. Stringer:

Q. In diagnosing the case, Doctor, there are two kinds of symptoms that you go on, objective symptoms and subjective symptoms,—am I correct?

[fol. 97] A. Yes, sir.

Q. Objective symptoms are what you can see or feel, or which the X-ray reveals. Would you answer, so the reporter can get it? You nodded your head, Doctor, but the reporter——

A. Yes.

Q. And subjective symptoms are the symptoms which the patient tells you about?

A. Yes, sir.

Q. Now, of course, there is no question but what some of his ribs were broken, in this unfortunate accident, but as I understand you, those ribs have healed?

A. The ribs have healed with a slight deformity in the line of the fracture.

Q. Yes, but as Doctor Sheldrop told us on Saturday, this will cause him no trouble?

A. I don't think it will.

Q. You agree with that?

A. I will agree with that testimony.

Q. Now, all the scars on his head and back have healed, have they not?

A. Yes, sir.

Q. And his burns have healed?

A. Yes, sir.

Q. And with the exception of the X-ray photograph there is no objective symptom showing anything the matter with his back?

A. Yes; I think he has a slight rotation of his spine, of the spinous process.

Q. Well, what do you mean by that?

A. That they are out of line. There is——

Q. Well, a slight curvature of the spine, which Doctor Sheldrop mentioned on Saturday also, which he said he couldn't tell what it came from, and you agree with that, I take it?

[fol. 98] A. I agree with that, but he has this curvature.

Q. You don't know what caused that?

A. No, I don't.

Q. Well, you will have to answer, so we get it in the record.

A. No.

Q. It may have been from any number of things. Now except the X-ray picture there is nothing, no objective symptom showing anything the matter with his back?

A. Only the reflexes that you are unable to——

Q. I am speaking of an examination of the back itself, you find nothing the matter that you could lay your hands on except what is shown by the X-ray picture?

A. No.

Q. Of course, you didn't take these X-ray pictures yourself?

A. No, sir, I did not.

Q. Doctor Sheldrop brought them down with him?

A. Yes, sir.

Q. And you and he went over them together?

A. Yes, sir.

Q. And he pointed out to you what he found in these X-ray pictures and you looked at them?

A. He didn't point out to me; he gave them to me and asked me what I could find.

Q. And you are of the opinion that there is a fracture of one vertebra?

A. Yes, sir.

Q. And you reached that conclusion from an examination of the X-ray?

A. In conjunction with the physical examination.

[fol. 99] Q. Now, vertebræ are a great many different shapes, aren't they?

A. Yes, sir.

Q. Some are square, some are pointed, and some are narrow and some are broad, are they?

A. Well, there is a difference in vertebræ as to their location, whether cervical, thoracic or lumbar vertebræ.

Q. And there is a difference of vertebræ in the same location in different people, are there not?

A. Yes, sir, some difference.

Q. In other words, you may have a vertebræ which is narrower than the other vertebræ and narrower than the same vertebræ in another person and yet that would be perfectly normal, would it not?

A. Why, you could have narrower vertebræ in different individuals that would be different, but——

Q. Yes; and the man——

Mr. Davis: Wait a minute. Let him finish the answer.

Mr. Stringer: I am examining this witness.

A. I would like to qualify that, because it is——

Mr. Davis: You might be fair.

A. There is a marked difference—there is not a marked difference in the size of the vertebra there is in this picture.

Mr. Stringer:

Q. As a matter of fact, it is almost impossible to obtain and find a spine where all the vertebrae are absolutely perfect,—isn't that true?

A. Well, I am not qualified to say.

[fol. 100] Q. Well, that is what—you haven't had very much experience on the shape of these vertebrae then, Doctor?

A. Well, I have looked at quite a few.

Q. Well, now, getting back to my old question, you don't know whether it is a fact that it is a hard matter to find any spine in any man where all the vertebrae are perfect in shape? Isn't that true?

A. Oh, I don't think it would be so hard.

Q. Well, at any rate, a great many perfectly normal people have vertebrae which vary in shape from the usual shape of vertebrae in other people?

A. They vary within normal limits.

Q. And sometimes they are square and sometimes they are pointed and sometimes they are narrow and sometimes they are broad?

A. Well, that is awfully ambiguous, on the spine or on vertebrae, I don't know whether——

Q. Well, vertebrae vary in shape and size the same as a man's head?

A. Yes, they vary in size, but it is due to the location?

Q. Now, the reason you say there is a fracture of this vertebra, this particular one which you pointed out, appears to be narrower than the others?

A. Well, it is narrower and it shows the compression—impacted fracture.

Q. Well, what you say shows an impacted fracture on account of its shape as it appears in the picture?

A. Shape, yes.

Q. That is the only evidence of a fracture which you see?

[fol. 101] A. Well, in the X-ray picture?

Q. Yes.

A. In the contour all the way around of the vertebrae?

Q. Yes.

A. Yes.

Q. And because that vertebra is a little different shape than the rest, you say it is a fracture. I am right on that, am I?

A. You are.

Q. Of course, in this X-ray you can't see any fracture?

A. Yes, sir.

Q. You are going on the shape of the vertebra?

A. Well, there is no crack running through it that is evident at this time.

Q. And there is no piece broken off?

A. Well, it shows where a piece has been scooped out on the top. It is pathologically known that such a fracture will give that picture.

Q. You are not, of course, an expert on the spine contour; you haven't specialized on it?

A. No, I haven't specialized.

Q. What is your speciality, or have you one?

A. Well, I am practicing general medicine.

Q. Are you engaged in surgery?

A. Yes, sir.

Q. That is all.

Redirect examination.

Mr. Davis:

Q. Doctor, with reference to this ex-ray of the spine, the suggestion has been made that any spinal—if you will look up here again. This is the spine, is it?

[fol 102] A. Yes, sir.

Q. Now, is that the right position?

A. Yes, sir.

Q. Now, then, this impacted fracture appears at what point?

A. At this point right here (indicating).

Q. Up where to where?

A. Well, it starts in and comes down to here. That should come right straight across on this whole area. That is pushed together and this has been taken out.

Mr. Stringer: I move to strike out the answer as not responsive to any question.

Mr. Davis: Oh, I think it is.

The Court: Motion granted.

Mr. Davis:

Q. Tell the jury where this shows clearly an impacted fracture and not a normal condition on that one.

Mr. Stringer: I object to that as argumentative.

The Court: Objection sustained.

Mr. Davis:

Q. Just show them where the impacted fracture is and explain that to them.

A. The fracture is in the first dorsal lumbar at this point where it is scooped out, and it shows where the injury came it is pushed right together, that is, the bone itself is just pushed right down and the structure of the vertebra is spongy on the inside, and when you

have an injury to it, it compresses it together, and they call it a compressed fracture of the vertebra.

Q Now, Doctor, where such a condition as this is normal, do you expect to find any paralysis of the left leg?

[fol. 103] Mr. Stringer: I object to that as immaterial and assuming facts not in evidence.

Mr. Davis: They have gone into it.

The Court: Overruled.

Mr. Davis:

Q. You may answer.

A. What was the question?

Q. If this were a normal condition, would you expect to find any impairment of the motion or use of the leg at all?

A. You wouldn't expect to find any.

Q. Would you expect to find where it is a normal condition that there would be any impairment of the use of the back or any pain in his back?

A. No, sir.

Q. Where it is normal, would you expect a fairly average doctor to put on a corset or something to keep the back in place?

A. No, sir.

Q. That is all.

Mr. Stringer: That is all.

Mr. Davis: Plaintiff rests.

Mr. Stringer: We will waive the opening to the jury and call Dr. Post.

CARL M. POST, called and sworn as a witness for and in behalf of the defendant, testified as follows:

Mr. Stringer:

Q. Doctor Post, where do you live?

A. Des Moines, Iowa.

Q. And what is your business or profession?

A. I am practicing surgery.

[fol. 104] Q. How long have you practiced your profession?

A. Since 1913.

Q. And where did you receive your medical education?

A. Drake Medical College, Des Moines, Iowa.

Q. And what has been your experience in the line of your medicine? Where have you practiced?

A. Des Moines, Iowa.

Q. Prior to the time that you became a physician and surgeon what was your profession?

A. I was an osteopath.

Q. How long did you practice that profession?

A. Four years.

Q. And what does the study of and practice of the profession of osteopathy include?

A. Specially a careful study of the spine and the vertebra in particular.

Q. And you have, I believe you state, in 1913—

A. Graduated from medicine, but it was 1907 in osteopathy.

Q. And since that time you have been practicing your profession at Des Moines?

A. Yes.

Q. Are you a surgeon of the Rock Island road at that point?

A. Yes.

Q. How long have you occupied that position?

A. Since 1914.

Q. Have you had experience in respect to injured spines?

A. Yes.

Q. To what extent have you had that experience?

[fol. 105] A. Quite extensive.

Q. Are you acquainted with the plaintiff, Fred A. Elder?

A. Yes.

Q. When did you first meet him?

A. February the 5th.

Q. And where did you see him?

A. At Chariton, in the hospital.

Q. You were called down there to—

A. I was.

Q. Examine the man injured in this wreck?

A. Yes.

Q. And when did you next see him?

A. May the 5th.

Q. Of 1923?

A. Of 1923, yes.

Q. Where did you see him at that time?

A. At my office in Des Moines.

Q. And where did you see him after that?

A. June the 7th and 8th, at my office.

Q. Well, did you examine him again today?

A. I did.

Q. Now, will you please tell us at the time of your examinations what the man was suffering—what complaints he made, if any, and what he was, in your opinion, suffering from—from the first examination?

A. At the first examination the man was—I saw him in the hospital. He was in an unconscious or semi-comatose condition. He could be aroused to a slight degree by attempting to move his body. He had a first degree burn from about the—a little above the middle of the back to about the middle of the under surface of the thighs. [fol. 106] That was just to the back. He had a small wound to the left sub-occipital region and several minor little cuts and bruises, not to any great extent. He complained, especially when attempting to palpitate the chest, of considerable soreness on his left side so we assumed there were probably fractured ribs in that side, and his



condition was such for a day or so there was no particular need of rushing him for X-ray, so he was not moved at the time I was there.

Q. I take it at that time the conditions were such you couldn't make a very complete or satisfactory examination.

A. No.

Q. You next saw him in May at your office?

A. Yes, sir; May 5th.

Q. Will you tell us what he complained of at that time and his condition, as you found it?

A. At the time of May 5th he complained of distress, especially in the front part of the chest, and soreness around in the middle of the back, high up between the shoulders, in what we call the mid-dorsal region; he complained of—regarding this pain, especially if he was standing, or things of that kind. He had at that time a corset that somebody had given him, some man that had had a broken back, that had formerly used the corset and, he said, was not using it now, and he was wearing this corset. It seemed to fit him fairly well and he said it gave him a support to his chest. There was no complaint made on the lower part of his spine at that time. I went over examining his reflexes; his reflexes were practically normal—patellar and the angloclonosis reflexes—but he did have con-[fol. 107] siderable soreness in the immediate dorsal region and around on the left side where the ribs were fractured.

Q. Now, did you see an X-ray of him at that time?

A. Yes. Doctor Borgem X-rayed.

Q. And that X-ray showed that the ribs had been broken?

Mr. Davis: Just a moment. Where is the X-ray?

Mr. Stringer: It is right here.

A. Have you that X-ray?

Q. There is no question about his ribs having been broken?

A. Oh, no.

Q. And had they at that time united?

A. Had what? Yes, there was union.

Q. And what sort of a union was it?

A. Perfectly good union.

(X-ray marked defendant's Exhibit "C.")

(X-ray marked defendant's Exhibit "D.")

Q. You have produced here in court, Doctor, two X-rays, which you used in making your diagnosis at that time.

A. Yes.

Q. They are marked defendant's Exhibits "C" and "D," and also marked defendant's Exhibit "E." Is that one of ours, or one of yours?

(X-ray marked defendant's Exhibit "E.")

Q. Now, what is the fact as to whether there is any material difference between the pictures you had, so far as the ribs are concerned, and the pictures which the plaintiff has introduced here in evidence?

A. Not any. Their pictures are probably a little bit clearer of the spine.

[fol. 108] Q. So far as the ribs are concerned, is there any material difference or—

A. No, sir; just about the same thing.

Mr. Stringer: Did you wish those introduced in evidence?

Mr. Davis: Yes, I wish those introduced.

Mr. Stringer:

Q. Now, what, in your opinion, has been the recovery from those broken ribs?

A. There is good union in the ribs.

Q. State whether or not, in your opinion, the fact that those ribs were broken is going to in the future cause him any material disability?

A. No.

Q. At the time of your examination in May, state what the condition of his back was with respect to burns and bruises.

A. There was an abrasion, that is, healed scar, around the region of the first or second lumbar and one over the upper cloteal region, I think, on the left side. They were just superficial.

Q. Well, as I understand you then, the burns had healed or not?

A. Yes, pretty well healed.

Q. And had these wounds, the external wounds healed?

A. Yes.

Q. Now, did he at that time complain of any pain in the region of the spine?

A. In the mid-dorsal, up above.

Q. Where is the mid-dorsal region?

A. Up about here to here.

Q. Just below the shoulder blades?

A. Below the shoulder and between the shoulder blades.

Q. He complained of pain there?

[fol. 109] A. Yes.

Q. And did you reach any conclusion as to the cause of that pain?

A. That was probably due at that time to the fractured ribs.

Q. Well, that would be your opinion?

A. Yes.

Q. Now, did he complain of any pain in the lumbar region?

A. No.

Q. You were in court this afternoon when Doctor McIntyre testified?

A. Yes.

Q. You were not, I believe, here the other day, however, when Doctor Sheldrop testified?

A. No, I was not.

Q. You did not, I believe, take any pictures of his spine in the lumbar region at that time?

A. No.

Q. Have you ever had a picture taken of that?

A. No.

Q. And why didn't you take a picture?

Mr. Davis: Now, that is calling for the conclusion of the witness and self-serving. Well, go ahead. I withdraw my objection. Answer it.

A. There was not any symptoms in that region expressed by the patient or found on palpation, so there was no reason for it.

Mr. Stringer:

Q. Now, did you make another examination of him in June?

A. June, the 7th and 8th.

Q. Now, state the condition you found him in at that time?

A. His general condition seemed to be somewhat improved at that [fol. 110] time and he still complained somewhat of distress and was wearing this corset affair, and at that time he stated that the corset seemed to cause him some distress, so that he wasn't able to wear it part of the time, that it seemed to hurt the sternum.

Q. Did he at that time complain of any pain in the lumbar region?

A. No, he did not; only the mid-dorsal region and chest.

Q. Now, you examined him again today, did you not, Doctor?

A. Yes, sir.

Q. In Doctor McIntyre's office?

A. Yes; with Doctor McIntyre present.

Q. During the noon recess?

A. Yes.

Q. Now, what did you find? Just describe what your examination was and what symptoms he——

A. The examination of the head practically normal; the patellar reflexes practically normal; and the contour of the chest shows a long lateral curve, which is quite commonly found in a right-handed person, a left-handed individual having it on the opposite side; you could feel the calluses over the united fractures of the ribs, and we noticed on the examination of the back the slight superficial scars which are present. The examination of the abdomen was practical-negative; the scrotal reflex was apparently about normal; the patellar reflex on both legs were normal.

Q. What is the patellar reflex?

A. Striking the knee and getting response. They were just—and [fol. 111] both the right and the left leg would respond the same way. The babinsky—we didn't get a babinsky.

Q. What is a babinsky?

A. The babinsky is one of the reflexes, which is especially pronounced with spinal region injuries to the spinal cord. It is produced by scratching the sole of the foot along the inner side. It indicated that there was not any spinal cord injury.

Q. If there had been a spinal cord injury, what would you expect to find?

A. You would have got the reflexes with the babinsky sign.

Q. Now, did you examine the X-ray plates that Doctor Sheldrop brought down with him?

A. Yes.

Q. When did you examine those, Doctor?

A. This morning.

Q. Now, will you examine again, Doctor, plaintiff's Exhibit One? You also examined it this morning, Doctor?

A. Yes.

Q. And since that time you have examined the man?

A. Yes.

Q. I will ask you whether or not that X-ray picture shows any fracture of the spine?

A. No positive evidence of a fracture of the spine.

Q. You heard Doctor McIntyre's testimony?

A. Yes.

Q. In which he pointed out what he thought was an injury to one of the dorsal vertebræ?

A. Yes.

[fol. 112] Mr. Davis: Not what he thought; what he said it was.

Mr. Stringer:

Q. Do you find that indicated on that X-ray?

A. The first lumbar vertebra is somewhat of a wedge shaped vertebra. There is a lipping of the twelfth dorsal which extends slightly down here and a corresponding faucet-like depression of the first lumbar, which is quite characteristic of different people. You will find all kind of variation of lipping. There is the spinal canal through which the spinal cord runs, apparently is not disturbed, so that there is no evidence that you can see, if there would be any infringement or pressure upon the spinal cord. The wedge shape, slight wedge shape, shaping toward his lumbar vertebra, is not at all uncommon to find in almost any individual.

Q. Well, then, in your opinion, Doctor, in your examination and from the examination of that X-ray, has this man a broken vertebra or not?

A. No; he had—at no time have I seen him with the symptoms of what would indicate pressure upon the cord and the evidence of a fractured vertebra.

Q. Well, is there any evidence that you know of of a fractured vertebra?

A. No.

Q. In your opinion, has he a fractured vertebra?

A. No.

Mr. Stringer: You may inquire.

[fol. 113] Cross-examination.

Mr. Davis:

Q. In your opinion, did he ever have a fractured vertebra?

A. No; not any symptoms that I could find at the time.

Q. Doctor, looking at this X-ray, I will ask you this question—answer yes or no—isn't it a fact that in this X-ray, where the first

dorsal appears, that that condition shows the same as it might be brought about by a fracture as well as by normal condition? Can you answer that by yes or no?

A. No; if you refer to the body of the vertebra, the whole vertebra.

Q. I am speaking about the lessened space on the body of the vertebra, is there any indication that it may have been?

A. No, not positive, because you have to take the body of the vertebra and the lateral surface and the——

Q. Now, Doctor, what does the lacking of this space indicate, if anything?

A. An anomaly or peculiarity in the individual.

Q. Do you always find that anomaly after a man's in a railroad wreck?

A. No; you can find it in those not injured at all.

Q. Would you expect after a man has been injured, shortening that be an indication, shortening of space had been due to an injury?

A. If that was the region that was injured.

Q. Now, Doctor, you did not take an X-ray of that man's spine, did you?

[fol. 114] A. No.

Q. He came to you in May and complained of pain in the mid-dorsal region?

A. Yes.

Q. And isn't it a fact that if there had been an impacted fracture there that that pain might have reference to just where he complained of it there?

A. No.

Q. Not necessarily. Isn't it a fact that it would be?

A. No. If he had an impacted fracture of the first lumbar vertebra, he would probably have disturbance of the——intervention of the first lumbar nerve or the twelfth dorsal nerve.

Q. Do you know whether any X-rays were taken at the hospital?

A. I don't know whether any X-rays were taken at the hospital?

Q. Didn't you know that Doctor Yokum did take some there?

A. I don't know.

Q. You didn't inquire about that as surgeon for the Rock Island?

A. It wasn't my business.

Q. This man came to you in May and June?

A. Yes.

Q. You never at any time, did you, take an X-ray of his spine?

A. The spine to a certain degree is his neck.

Q. Now, Doctor, if this is an impacted fracture, as McIntyre and Sheldrop say, isn't it a fact that an X-ray taken earlier and closer to the injury would be shown out more clearly the point of fracture or fracture?

[fol. 115] A. Yes.

Q. And you took none of his back so as to show the first lumbar?

A. No.

Q. Now, Doctor, did he complain to you of pains in the pelvis?

A. No.

Q. Not at any time?

A. Not in the pelvis.

Q. And did you take an X-ray of his pelvis?

A. No; he didn't complain of any pains in the pelvis.

Q. When he first came to you, did he have this corset on?

A. Yes; I think he had that on the first time.

Q. Who took those X-rays you produced?

A. Doctor Burgem.

Q. Were they taken in your presence?

A. No.

Q. He took them; they were not in your presence?

A. No. They were taken April the 16th, and that was a month before I examined him. It was at Doctor Burgem's office. Doctor Burgem does nothing but X-ray work in Des Moines.

Q. Now, when you examined him today, did he complain of pain in the dorsal region?

A. Yes; all along.

Q. Did you test him by having him stoop over and try to straighten up?

A. Yes.

Q. Did he exhibit any difficulties in doing so?

A. He stooped to about a slight angle and gradually straightened up, apparently with some difficulty.

[fol. 116] Q. Now, then, in the different times that you have examined him, I will ask you to state whether or not—I will ask you if you found him at any time anything but frank and free in disclosing his condition?

A. Yes, he seemed to be perfectly willing.

Q. And, Doctor, he has testified that for the past year he has had pain, a continuous pain in the dorsal region, and that he has pain now there. Assuming that to be true, that he has had that pain in that region, and then taking into connection with it the X-ray picture, wouldn't you then say that that would be any question of an injury to the spine, assuming those things to be true?

A. It would be an injury to the upper portion of the spine in the lumbar region.

Mr. Stringer: You said dorsal.

Mr. Davis:

Q. The first lumbar region, assuming that there had been in that region, then taking into consideration the X-ray and that that pain, assuming that it had continued for years and still bothered him, you would then say that there was any question of an injury and fracture to that spine?

A. Assuming that you would make that statement about pain to examination with the patient——

Mr. Davis: I move that the answer be stricken out, because I stated, assuming those things to be true.

Mr. Stringer: He has a right to answer the question, and I submit he was doing so.

The Court: Strike it out, if counsel——

Mr. Davis;

Q. Doctor, just understand the question and then answer it with-  
[fol. 117] out any explanation. Assuming that his testimony is  
true, if you can, Doctor, that he could tell the jury—

A. Yes.

Q. That he has suffered pain in that region of the first lumbar for  
the last year, that that pain has been practically constant, and as-  
suming the condition you found in the X-ray, I will ask you then  
if it is not a fact that, in your opinion, you would have to say that  
he sustained an injury to the first lumbar vertebra? You may  
answer that by yes or no.

A. No; that isn't an injury sufficient to cause compression of the  
cord or nerve symptoms.

Q. Would you say that there had been no injury to the first  
lumbar vertebra, assuming his testimony to be true and taking into  
consideration the X-ray?

A. Not any more than the other, the upper dorsal.

Q. Not any more. That is all.

Mr. Stringer: That is all.

SAM WOODS, called as a witness for the defendant, testified as  
follows:

Mr. Stringer:

Q. Mr. Woods, you are the engineer in charge of this train. What  
time did you leave Chariton in the morning?

A. We left about—we left Chariton about 8:45.

Q. When you were doing work of this kind, what is the fact as  
to whether you received an order before you left?

[fol. 118] A. We do receive an order before we leave.

Q. And did you receive such an order that morning?

A. We did.

Q. And when did you receive that order?

A. When we went to work.

Q. About what time?

A. Along about seven o'clock, if I remember right.

Q. Have you that order with you?

A. I have.

Q. Will you produce it?

(Train order marked defendant's Exhibit "F.")

Q. I show you defendant's Exhibit "F" and ask you, Mr. Woods,  
whether that is the order which you received when you went to work  
in the morning and pursuant to which you were working that morn-  
ing?

A. It was.

Mr. Stringer: I offer it in evidence.

Mr. Davis: No objection.

(Defendant's Exhibit "F" read to the jury by Mr. Stringer.)

Mr. Stringer:

Q. Did you at any time during that morning receive any other order?

A. I did.

Q. With respect to the work that should be done that morning?

A. No, sir.

Q. What is the fact as to whether that was the order upon which you were working that morning?

A. What was the fact of it?

[fol. 119] Q. Yes. Is that the order on which you were working during that morning?

A. That is the order that we made our movement from to the mine on, yes, sir, to Pershing siding.

Q. Now, after one p. m. what would be necessary in order that you would do any work?

A. We would have to receive more running orders from the dispatcher.

Q. And who is it issues all these orders?

A. The dispatcher.

Q. I see that order expires at one p. m. Had you ever received an order for any work to be done after one p. m. that day?

A. No, sir.

Q. What is the fact whether or not when you got back to Chariton you would have received orders what to do in the afternoon?

A. Yes, sir.

Q. Do you know what you were going to do in the afternoon?

A. I do not.

Mr. Stringer: You may inquire.

Cross-examination.

Mr. Davis:

Q. Did you go in to get water?

A. We were going to Chariton for water and dinner; yes, sir.

Q. Now, then, so far as this order is concerned that has been introduced, that is a running order for you to have the right to go onto the main track and from there on to Pershing siding?

A. Yes, sir.

[fol. 120] Q. This order doesn't contain a direction to what you were doing at the mine?

A. No, sir.

Q. So far as this is concerned, it doesn't?

A. It doesn't have nothing to do with only the movement of the train from Chariton to Pershing.



Q. Yes; it is your right to go out on the main line?

A. Yes, sir.

Q. And then you received another order, that day, didn't you?

A. I received——

Q. Produce it.

A. There is the orders I received that day.

Q. Now then, handing you Exhibit Eight, that is an order that you received before you went into Chariton, isn't it?

A. Yes, sir.

Q. And you would have to receive that order in order to get the right to go on the main line?

A. Yes, sir.

Q. It had nothing to do with reference to what work you were doing at the mine, did it?

A. No, sir.

Q. And none of the orders which you received that day, which you produced, had anything——

A. At the mine; no, sir.

Q. Of course, the conductor would be the one knowing what work would be done at the mine?

A. Yes, sir.

Q. You wouldn't have any orders as to what work to do at the mine?

A. No, sir.

Q. But any order you receive, you would receive from the conductor as to work at any mine?

[fol. 121] A. Yes, sir.

Q. And that would be given verbally or by signal?

A. Yes, sir.

Mr. Davis: We offer in evidence Exhibit Eight.

Q. So far as you know, you switched those mines a number of times and got to know it?

A. Yes.

Q. If your conductor had orders to switch the mine, you had to go into Chariton for water, he wouldn't have to get another order to finish switching the mine; the only thing he would have to get was an order for the right to get on the main track?

A. As far as I know.

Q. And the orders he got was to have the use of the main line track?

A. That he gave me.

Q. That is the only order you would have anything to do with?

A. Yes, sir.

Q. And that order is obtained in order to safe guard trains on the main line as well as yours?

A. Yes, sir.

Q. And it is part of the general running, immediate work of the railroad in running that main line, isn't it?

A. Yes.

Q. And often times, I will ask you, if you haven't gone to Williamson or Chariton, while switching the mine, and then gone back to finish up in the afternoon? That is frequently the case?

A. Yes, sir.

Q. In fact, that is practically the custom?  
[fol. 122] A. Yes.

Q. And you didn't have to, or the conductor, after switching the mine to get another order to switch the mine, would he? You know that, don't you?

A. No, he would give me no orders to switch the mine.

Q. No. And so far as this order is concerned here—this order introduced by Mr. Stringer, Exhibit "F"—that was simply an order giving you the right to use the track at certain times and giving you information of certain trains that had either the right of way or—

A. Yes, sir.

Q. Had nothing to do with the work in along at the mines?

A. No, sir.

Q. And so far as you know, you do know that Mr. Hope intended to go back there, don't you?

A. I don't know anything about that, only what he told me.

Mr. Stringer: Objected to as calling for the conclusion of the witness.

The Court: Objection sustained.

Mr. Davis:

Q. You frequently would leave the mine at noon and go to get water and coming back and switch the mines?

A. Yes, sir.

Q. That was practically the custom of doing the work. You didn't eat your dinner at the mine?

A. No, sir.

Q. Mr. Woods, these switching of the mines you ran your engine?

A. Yes, sir.

[fol. 123] Q. And whatever movements of the cars or the engine in the mines would have to be made—was made on direction from the conductor or brakeman to you?

A. Yes, sir.

Q. And so far as you know, you didn't know whether or not there was any more work to be done at that mine or not, do you?

A. No, sir, I don't know anything about that.

Q. And if the work hadn't been finished, you do know that you would have had to gone back and finished it?

A. Yes.

Q. And you don't know of any order being received by the conductor or that day which told him not to finish the work, do you?

A. No, sir.

Q. That is all.

Redirect examination.

Mr. Stringer:

Q. Before you came out of Chariton after one p. m. would you have had to get another order?

A. Yes, sir; from the dispatcher.

Q. Is there any way of knowing what order you would have got?

A. No, sir.

Q. What is the fact some times you have been told to go to another point?

Mr. Davis: Objected to as leading and suggestive, your Honor.

A. Objection sustained.

Mr. Stringer:

Q. What is the fact as to whether orders are or are not frequently [fol. 124] given to go to another place under a condition of this kind?

Mr. Davis: Objected to as leading and suggestive and calling for the conclusion of the witness.

The Court: Overruled.

Mr. Stringer:

Q. You may answer.

A. Why, Yes; we go by orders of the dispatcher and do different work.

Q. Do you know and have you any way of knowing what work you were going to do in the afternoon?

A. I do not.

Q. That is all.

Recross-examination.

Mr. Davis:

What you mean is this, that if you were going back to switch that mine that afternoon the conductor would have to get an order from the dispatcher allowing him the use of the main line?

A. Yes, sir.

Q. And that is the only order he would have to get from him to finish up that work at the mine?

A. So far as I know, it is.

Q. Yes. You were on the main line when you were hurt?

A. Yes, sir.

Q. And you were inside the main limits at the Pershing yard?

A. Yes, sir.

Q. And you were hit by a passenger train bound from Kansas City?

A. Yes, sir.

[fol. 125] Q. That is all.

Mr. Stringer: That is all.

A. May I take up my orders?

Mr. Davis:

Q. Except those two.

The Court:

Q. What time did this collision take place?

A. Well, the orders was received at that time.

Q. What time did the collision take place?

A. The orders was received at 12:10, as near as I know, after being told, and must have been along about 12:10. I don't know exactly myself.

Mr. Davis: Mr. Stringer says that the engineer desires to retain this Exhibit Eight, because he wants to be held free from blame himself, and they have agreed that I may read it into the record, and it reads as follows: "Work train extra 1574, Pershing, 12:07 p. m., C. Y. H.—that evidently stands for C. Y. Hope—No. 912, engineer unknown and all eastward extras wait at Chariton until 1:30 p. m. All first class trains due Pershing before 12:10 p. m. have arrived or left. Signed, B. T."

Q. One question, Mr. Woods, and you may have this. This notation here of "first-class trains at Pershing, 12:10 p. m., have arrived or left," was part of your order?

A. It was.

Q. And the train which hit you was one of the trains mentioned in that part of the order which hadn't arrived, wasn't it?

A. It was a first-class train that hadn't arrived; yes, sir.

Mr. Davis: Mr. Elder says that should be "engine unknown" instead of engineer unknown.

Mr. Stringer: Now, if your Honor please, we offer in evidence an [fol. 126] exemplified copy of the so-called Workmen's Compensation Act of the State of Iowa, it being pleaded in our answer.

Mr. Davis: I object to that. We object to it as incompetent, irrelevant and immaterial and not within any of the issues in this case.

Mr. Stringer: And I will make my record. And I also offer in evidence an exemplified copy of certain proceedings had before the Industrial Commissioner of the State of Iowa, the same being the body provided for by the Workmen's Compensation Act. This is duly certified to by the Industrial Commissioner and authenticated by the governor of the state, as is the copy of the Workmen's Act. Now, I would suggest that possibly they better be numbered as exhibits.

(Exemplified copy of Workmen's Compensation Act of Iowa marked defendant's Exhibit "G.")

(Exemplified copy of proceedings before the Industrial Commissioner of Iowa marked defendant's Exhibit "H.")

Mr. Stringer: Both exhibits are offered in evidence, defendant's Exhibit "G" being the Workmen's Compensation Act and the defendant's Exhibit "H" being the proceedings before the commissioner.

Mr. Davis: Objected to as incompetent, irrelevant and immaterial, no foundation laid and immaterial under the issues—no part of the issues in this case.

Mr. Stringer: What do you mean by no foundation laid, Mr. Davis,—not properly authenticated?

[fol. 127] Mr. Davis: I don't know. I haven't examined them, and I make that objection in behalf of caution, of course.

Mr. Stringer: Well, now, of course, that is something we have got to discuss with the court. Now, this might be suggested, that the court reserve a ruling on that and we argue the whole proposition together.

Mr. Davis: Well, I am ready to argue that proposition. This is entirely immaterial, as I view it.

Mr. Stringer: Either it is immaterial or it is conclusive, your Honor. We rest, with the understanding that the court is reserving the ruling on it.

Mr. Davis: Well, we expect to rest immediately afterwards, I believe, if the court wishes to hear us on that matter of the admissibility of those documents.

Mr. Stringer: I expect to move for a directed verdict.

The Court: I thought you might conclude your evidence on both sides and then I will hear the matter on this question.

Mr. Stringer: Well, we rest.

Mr. Davis: So do we.

#### COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Stringer: Now, if your Honor please, the defendant moves the court to instruct the jury to render a verdict in favor of the defendant and against the plaintiff, on the ground that it conclusively appears from all of the evidence that the plaintiff was not engaged in interstate commerce at the time of his injury, and that consequently any remedy that he may have in the premises is provided solely by the Workmen's Compensation Act of the State of Iowa [fol. 128] in proceedings instituted under that Act; and on the further ground that it appears from the proceedings of the Industrial Commission of the State of Iowa that that body has already adjudged—

Mr. Davis: If the court please, that is just what I object about, is placing that—having a motion of that nature before the jury;

that is the vice of it. This is either material or not. If it is material, it is decisive; if it is not material, it is prejudicial error to bring it before the jury.

Mr. Stringer: I have no objection. I think it would be quite proper to excuse the jury.

The Court: You may complete your record after the jury is excused. We will take a recess, and after the recess I will ask you members of the jury to remain in your jury room until the bailiff calls you. It seems to me that is objectionable to hear this argument in the presence of the jury, so you will remain in your jury room until the bailiff calls you. Take a fifteen minutes recess.

Mr. Stringer: What had I said, Mr. Reporter?

(Mr. Stringer's motion read.)

Mr. Stringer: And considered the matter, and acting judicially had adjudged and decreed that the plaintiff in this action was not engaged in interstate commerce, but, on the contrary, was engaged in commerce wholly within the State of Iowa, and that such decision and judgment of the Industrial Commission is *res adjudicata*—

Mr. Davis: There is no judgment yet, is there? Your record doesn't show that a judgment has been entered, does it?

Mr. Stringer: Not in the courts. Well, let me finish my motion—and binding upon this court, and that said decision and judgment of the Industrial Commission constitutes a judgment and a [fol. 129] judicial proceedings of the State of Iowa to which this court, under the Constitution of the United States, must give full faith and credit, and in the event the court should refuse to give faith and credit to said decision of said Industrial Commission, it will operate to deny this defendant of its rights in the premises as guaranteed to it by the Constitution of the United States, and a failure of this court to hold that said judgment is *res adjudicata* will operate to deprive this defendant of said constitutional rights and operate to violate the Constitution of the United States. Now, if your Honor please, I take it now there is now before the court a motion to direct a verdict and also a ruling upon these exhibits which have been introduced in evidence.

The Court: Both may be considered together.

(Argument by both counsel.)

The Court: I think the question as to whether the plaintiff was or was not engaged in interstate commerce should be submitted to the jury as a question of fact. The objection of the plaintiff to Exhibits "G" and "H" will be sustained and the motion of the defendant for a directed verdict will be denied. In case that the jury should find that the plaintiff was engaged in intrastate commerce, that would, of course, end the case. If the jury finds that the plaintiff was engaged in interstate commerce, then you go to the question of damages. If they answer the first question in the negative and say that the plaintiff was not engaged in interstate commerce, that ends the case.

Mr. Stringer: May we have an exception to the ruling?

The Court: Exception may be noted upon the part of the defendant.

[fol. 130]

#### CHARGE TO JURY

**MEMBERS OF THE JURY:** This action was brought by Fred A. Elder as the plaintiff against the Chicago, Rock Island & Pacific Railway Company as the defendant under what is known as the Federal Employers' Liability Act, an act of Congress affecting men and people who work for the railroads engaged in interstate commerce, that is, commerce between several states, and this action, as I say to you, was commenced in this court and was tried in this court under that act of Congress, and you members of the jury have been selected to try the facts in the case and determine what the facts are relative to the issues that will be submitted to you between this plaintiff and the defendant.

The plaintiff claims in his complaint that the plaintiff and the defendant at the time of the accident in question were engaged in what is called interstate commerce, that is, that they were engaged in the operation of the defendant railroad between several states, and that the work in which they were engaged in was not entirely within the State of Iowa, where this plaintiff resided and where the accident in question took place. The defendant denies that the plaintiff and the defendant at the time in question were engaged in interstate commerce, and you members of the jury will be asked to determine that question and that issue, and that is the first question that it will be convenient for you to determine in this case.

I am giving plaintiff's request number one, two and three as a part of the law in this case.

"One of the first questions for you to determine in this case is [fol. 131] whether at the time plaintiff met his injury, both plaintiff and defendant were engaged in interstate commerce.

"If you find that at that time plaintiff was not engaged in interstate commerce, then he cannot recover in this action, and your verdict will be for the defendant. On the other hand, if you find that at the time in question, plaintiff was engaged in interstate commerce, you would find for plaintiff on that issue and then proceed to determine the other issues in the case as the court will give them to you.

"It is undisputed that the defendant in this case, the Chicago, Rock Island & Pacific Railway Company, is an interstate carrier by railroad, and generally engaged in interstate commerce. The defendant contends that at the time plaintiff was injured, defendant was engaged purely in work not interstate in character and that the defendant and plaintiff were engaged wholly in intrastate commerce.

"It is a question for you to determine from all the evidence in the case whether or not the work in question was interstate at the time plaintiff was injured. An employee is engaged in interstate commerce when he is working directly with or about interstate cars or shipments; that is, cars or shipments going from one state to another. An employee may also be engaged in interstate commerce even

though he be not working about such cars or shipments at the precise time he was injured, if his work so closely and intimately connected with the general interstate work of the carrier as to be deemed, in law, a part of it.

"In other words, was the work of the employee, the plaintiff [fol. 132] Elder, at the time of his injury, so closely related to the general interstate work of the railroad company as to be practically a part of it? Was his work being done independently of the general interstate commerce in which the defendant was engaged? Was his work a matter of indifference, so far as the general interstate employment of the defendant was concerned?

"These are questions which you should determine from all the evidence which you have listened to in this case relative to the work being done at the time and just before plaintiff was injured. If, after a review of all this testimony, you are of the opinion that plaintiff's work had no relation to the general interstate work of the carrier, and that he was not engaged in interstate commerce, then your verdict should be for the defendant on that issue, and that would end the case.

"On the other hand, if you believe from this evidence that the plaintiff's work was so closely connected with the general interstate work of the railway company as to be deemed a part of it, and if you believe that such work was not a matter of indifference to the defendant, and was not being done independently of its interstate commerce, but that it was in fact so closely related to defendant's general interstate work as to be practically a part of it, then your verdict should be for the plaintiff on that issue, that plaintiff and defendant were at the time engaged in interstate commerce.

"Plaintiff loses his right to recover in this case on a certain Act, or statute of Congress, known as the Employers' Liability Act. This statute, so far as is here material, provides as follows:

[fol. 133] "Every common carrier by railroad while engaging in commerce between any of several states, \* \* \* shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, \* \* \* resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

"If you find, within the rule previously given you, that plaintiff and the defendant were engaged in interstate commerce at the time plaintiff was injured, then the rights of the parties are governed by this law of Congress.

"Under this Act the defendant would be liable to the plaintiff for any act of carelessness or negligence proximately resulting in injury to plaintiff, if such acts were done or performed by any agent, servant or employee of the defendant; that is, the defendant is liable for the acts of any of its agents, officers or servants.

"An employee returning from or going to work which is interstate in character is, while so doing, engaged in interstate commerce and



within the protection of the Employers' Liability Act of Congress, if injured while on the premises of the employer."

Now, that will be the first question for you to decide, and as I have stated to you under these instructions, if you find that the plaintiff and the defendant in this case at the time of the accident in question were engaged in interstate commerce, then you answer that question [fol. 134] in the affirmative. Then you will go to the question of damages, and in that event your verdict will be for the plaintiff. If you say that the plaintiff was engaged in work wholly within the State of Iowa, then, or course, your verdict would be for the defendant in this case.

Now, if you find for the plaintiff under the instructions—before you find for the plaintiff under the instructions given, you must find that the plaintiff and the defendant at the time of the accident in question were engaged in interstate commerce by a fair preponderance of the evidence. The burden of proof in this case is upon the plaintiff and he must satisfy you of the claims that he makes by a fair preponderance of the evidence that he was engaged—merce at the time of the accident in question, and by that we mean that the plaintiff and the defendant were engaged in interstate commerce—that the evidence on the part of the plaintiff upon those claims must weigh more than the evidence on the part of the defendant.

If you find under the instructions given that the plaintiff and the defendant were engaged in interstate commerce at the time of the accident in question, then, as I have stated to you, your verdict will be for the plaintiff, because the defendant in this case admits that the plaintiff was injured at the time in question through the negligence of the defendant Railway Company, and the defendant admits that the injuries which the plaintiff sustained by reason of this accident were the proximate result of the negligence of the defendant Railway Company.

Upon the question of damages, the court instructs the jury that [fol. 135] if you find for the plaintiff in this case, it will be your duty to award to him such damages as will fairly and reasonably compensate him for the injuries he received. In determining the amount of damages to which the plaintiff would be entitled as flow proximately from the accident complained of, it is your duty to take into consideration his age and his condition in life, the physical pain and amount of suffering which he endured, whether his injuries are temporary or permanent, the injuries with which he is afflicted, whether they are temporary or permanent, whether they are temporary or permanent and to what degree, any deformity which he bears, or whether he bears any other marks or scars as the result of this accident. You will also take into consideration whether his earning capacity has been reduced and what effect, if any his injuries will have on his earning capacity in the future. Take all those matters into consideration in arriving at a verdict. If you find for the plaintiff, take those matters into consideration in assessing damages—If you find for the plaintiff under the instructions given. And you are to determine these facts from all of the evidence in the case, all of the evidence that has been produced here in court.

You are the sole judges of the facts in the case. You are the judges of the credibility of the witness. You say what weight you will give to the testimony of each and every witness who has testified here.

Upon the question of damages, the law aims to give the plaintiff fair [fol. 136] compensation for injuries which he received and which are the direct and proximate result of the negligence of the defendant.

Now, take this case, members of the jury, and as I have stated to you, first determine the question whether or not the plaintiff and the defendant were engaged in interstate commerce at the time of the accident in question, and answering that question, as I have stated to you, if you answer it in the negative and say that they were not so engaged in interstate commerce; then your verdict will be for the defendant and that ends the case. If you say that they were so engaged in interstate commerce, then your verdict will be for the plaintiff and you will then go to the questions of damages, and take into consideration in determining these questions all of the instructions the court has given to you as the law applicable in this case and apply the law to the facts and make your findings accordingly.

As I have stated, the burden is upon the plaintiff in this case to satisfy you by a fair preponderance of the evidence of the claims that he makes.

I have prepared two forms of verdict, a verdict for the plaintiff and a verdict for the defendant. Your verdict must be unanimous during the first twelve hours of your deliberations, and if you agree upon a verdict during the first twelve hours, then your foreman, whom you will select after you retire, will insert the date and sign the verdict. If you cannot agree during the first twelve hours of your deliberations, then you may return a verdict if ten or eleven of you agree, but in that event the ten or eleven of you who do agree must [fol. 137] all sign the verdict; but your foreman in that case will not have to sign it.

Are there any omissions or inadvertencies on the part of the court that counsel would like to call attention to at this time?

Mr. Davis: Well, there was one thing,—I think the court said that if he worked entirely within the State of Iowa he wouldn't be engaged in interstate commerce. I think the court meant to say that if the work that he was doing in connection with the shipment was confined to the State of Iowa.

The Court: That was what the court meant to state, that if the work was entirely within the State of Iowa, and the shipments upon which he was working were solely within the State of Iowa, then he wouldn't be engaged in interstate commerce.

Mr. Davis: No other suggestions.

The Court: There are several exhibits here I omitted to mention in my instructions. You will have those to take to your jury room with you and consider those exhibits in connection with the oral evidence given here in court.

[fol. 138]

## Plaintiff's Requests

The plaintiff's requests were all given, and are set out in quotation marks in the charge.

## PLAINTIFF'S EXHIBIT No. 8

The Chicago Rock Island & Pacific Railway Company.

The Chicago Rock Island & Gulf Railway Company.

Train Order No. 26.

Des Moines, Feb. 4, 1923.

To C. & E. Wk Extra 1574

Form ) At Pershing

31 ) X. at 12:09 P. M.

C. Y. H. Operator.

No. 912 eng. unknown and all eastward extras wait at Chariton until 1:30 P. M. All 1st class trains due Pershing before 12:10 P. M. have arrived or left.

B. T.

Repeated 12:09 P. M.

C. Y. H. Operator

Signed by train made time dispatcher operator Hope Eng 1574

Com 12:09 P. M. J. E. G. Hope

Copy of Original.

[fol. 139]

## DEFENDANT'S EX. A

<b>C</b>	<b>No. 2</b>	<b>2-4</b>
87544	MR	1181
	FB	347
	U Jet	834
<b>C</b>	MR 85	1253
68398	FB U Jet	325
80		928
C 87413	D B	U Jet
C 86038	D	
C 89252		AR
MWS 1191	D	
C 82499		
LON 77906	H	
C 88243	F	U Jet
LON 62565	F	St. Joe
KCS 27783	F	St. Joe

## DEFENDANT'S EX. B

3-3-24

<b>W</b>		
C 99271	D	Allebre
C 100221	F	U Jet
C 98251	F	



## DEFENDANT'S EXHIBIT F

The Chicago Rock Island & Pacific Railway Company,  
 The Chicago Rock Island & Gulf Railway Company.  
 Train Order No. 10. Des Moines, Feb. 4, 1923.

To C. & E. Eng. 1491 and Eng. 1574.

Form At Chariton

19 X. at 6:50 A. M.

C. D. M. Operator.

Eng. 1491 and Eng. 1574 work seven-thirty 7:30 A. M. until one  
 1 P. M. Between Chariton and Williamson protecting against each  
 other and against second 2nd Class trains. All extras West wait at  
 Williamson until one 1 P. M. All extras East wait at Chariton until  
 one 1 P. M.

B. Y.

Made C O M.

Time 6:50 A. M.

By B. F. Y.

Mortgomery Operator.

Copy of Original.

[fol. 142]

DEFENDANT'S EX. G

State of Iowa, Secretary of State

I, W. C. Ramsey, secretary of state of the State of Iowa, do hereby  
 certify that the attached booklet is published and distributed by the  
 authority of the State of Iowa.

I do further certify that Pages 8 to 48 inclusive, of said booklet,  
 constitute and are the statutes of the State of Iowa now in force and  
 in full force and effect on the 4th day of February, 1923, upon the  
 subject of Employers' Liability and Workmen's Compensation as  
 the original statutes remain of record in my office.

In testimony whereof, I have hereunto set my hand and affixed  
 the official seal of the secretary of state of the State of Iowa.

Done at Des Moines this 4th day of June, A. D. 1923.

(Seal)

W. C. Ramsey, Secretary of State.

Workmen's Compensation Law

[fol. 143]

Text of Statute

Title XII, Chapter 8-A, Supplement to the Code, 1913, as Amended  
 by the 37th, 38th and 40th General Assemblies

### Part I

Section 2477-m. Employers—Employees—Exceptions.—(a) Pre-  
 sumption—Employees Excepted.—Except as by this act otherwise  
 provided, it shall be conclusively presumed that every employer as  
 defined by this act has elected to provide, secure and pay compensa-  
 tion according to the terms, conditions and provisions of this act  
 for any and all personal injuries sustained, by an employee arising  
 out of and in the course of the employment; and in such cases the

employer shall be relieved from other liability for recovery of damages or other compensation for such personal injury, unless by the terms of this act otherwise provided; but this act shall not apply to any household or domestic servant, farm or other laborer engaged in agricultural pursuits, nor persons whose employment is of a casual nature. The provisions of this act shall not apply as between a municipal corporation, city or town and any person or persons receiving any benefits under, or who may be entitled to, benefits from any "firemen's pension fund" or "policemen's pension fund" of any municipal corporation, city or town.

(b) Compulsory.—Where the state, county, municipal corporation, school district, cities under special charter or commission form [fol. 144] of government is the employer, the terms, conditions and provisions of this act for the payment of compensation and amount thereof for such injury sustained by an employe of such employer shall be exclusive, compulsory and obligatory upon both employer and employe.

(c) Rejection of Terms—Reasons for.—An employer having the right under the provisions of this act to elect to reject the terms, conditions and provisions thereof and (who) in such case exercises the right in the manner and form by this act provided, such employer shall not escape liability for personal injury sustained by an employe of such employer when the injury sustained arises out of and in the usual course of the employment because:

(1) The employe assumed the risks inherent in or incidental to or arising out of his or her employment, or the risks arising from the failure of the employer to provide and maintain a reasonably safe place to work, or the risks arising from the failure of the employer to furnish reasonably safe tools or appliances, or because the employer exercised reasonable care in selecting reasonably competent employes in the business;

(2) That the injury was caused by the negligence of the co-employe;

(3) That the employe was negligent unless and except it shall appear that such negligence was wilful and with intent to cause the injury; or the result of intoxication on the part of the injured party.

(4) (d) Negligence Presumed—Barden of Proof—Notices of Election to Reject—Presumption on Failure to Give Notice.—In [fol. 145] actions by an employe against an employer for personal injury sustained arising out of and in the course of the employment where the employer has elected to reject the provisions of this act, it shall be presumed that the injury to the employe was the direct result and growing out of the negligence of the employer; and that such negligence was the proximate cause of the injury; and in such cases the burden of proof shall rest upon the employer to rebut the presumption of negligence.

Every such employer shall be conclusively presumed to have

elected to provide, secure and pay compensation to employes for injuries sustained arising out of and in the course of the employment according to the provisions of this act, unless and until notice in writing of an election to the contrary shall have been given to the employes by posting the same in some conspicuous place at the place where the business is carried on, and also by filing notice with the Iowa industrial commissioner with return thereon by affidavit showing the date that notice was posted as by this act provided. Provided, however, that any employer beginning business after the taking effect of this act and giving notice at once of his desire not to come under the provisions of this act shall not be considered as under the act; provided, however, that such employer shall not be relieved of the payment of compensation as by this act provided until thirty days after the filing of such notice with the Iowa industrial commissioner, which notice shall be substantially in the following form:

[fol. 146]

### Employers' Notice to Reject

To the employes of the undersigned and the Iowa industrial commissioner:

You, and each of you, are hereby notified that the undersigned rejects the terms, conditions and provisions to provide, secure and pay compensation to employes of the undersigned for injuries received as provided in the acts of the—(thirty-fifth) general assembly known as chapter—(one hundred forty-seven), and elects to pay damages for personal injuries received by such employe under the common law and statutes of this state modified by subdivisions one, two, three and four of section one, chapter—(one hundred forty-seven) of the acts of the—(thirty-fifth) general assembly and acts amendatory thereto.

(Signed) — —.

STATE OF IOWA,

— County, ss:

The undersigned being first duly sworn deposes and says that a true, correct and verbatim copy of the foregoing notice was on the— day of — 19—, posted at — (state fully place where posted).

Subscribed and sworn to before me by — — this — day of —, 19—.

— — Notary Public.

The employer shall keep such notice posted in some conspicuous place which shall apply to the employes subsequently employed by [fol. 147] the employer with the same force and effect and to the same extent and in like manner as employes in the employ at the time the notice was given.

Where the employer and employe have not given notice of an election to reject the terms of this act, every contract of hire express

or implied, shall be construed as an implied agreement between them and a part of the contract on the part of the employer to provide, secure and pay, and on the part of the employe to accept compensation in the manner as by this act provided for all personal injuries sustained arising out of and in the course of the employment.

Sec. 2477-m1. Wilful Injury—Intoxication.—No compensation under this act shall be allowed for an injury caused:

(a) By the employe's wilful intention to injure himself or to wilfully injury another; nor shall compensation be paid to an injured employe if injury is sustained where intoxication of the employe was the proximate cause of the injury.

Sec. 2477-m2. Rights of Employee—Notice to Reject.—(a) Exclusive of Other Rights—Presumption—Notice.—The rights and remedies provided in this act for an employe on account of injury shall be exclusive of all other rights and remedies of such employe, his personal or legal representatives, dependents or next of kin, at common law or otherwise, on account of such injury; and all employes affected by this act shall be conclusively presumed to have elected to take compensation in accordance with the terms, conditions and provisions of this act until notice in writing shall have been served upon his employer, and also on the Iowa industrial [fol. 148] commissioner, with return thereon by affidavit showing the date upon which notice was served upon the employer.

(b) Rejection—Procedure—Oath—Form—Undue Influence.—In the event such employe elects to reject the terms, conditions and provisions of this act, the rights and remedies thereof shall not apply where an employe brings an action or takes proceedings to recover damages or compensation for injuries received growing out of and in the course of his employment, except as otherwise provided by this act; and in such actions where the employe has rejected the terms of this act the employer shall have the right to plead and rely upon any and all defenses, including those at common law, and the rules and defenses of contributory negligence, assumption of risk and fellow-servant shall apply and be available to the employer as by statute authorized unless otherwise provided in this act. Provided, however, that if an employe sustains an injury as the result of the employer's failure to furnish or failure to exercise reasonable care to keep or maintain any safety device required by statute or rule, or violation of any of the statutory provisions or rules and regulations now or hereinafter in force relating to safety of employes, the doctrine of assumed risk in such case growing out of the negligence of the employer shall not apply or be available as defensive matter to such offending party. The notice required to be given by an employe shall be substantially in the following form:



[fol. 149]

## Employees' Notice to Reject

To ——— (name of employer) and the Iowa Industrial Commissioner:

You, and each of you, are hereby notified that the undersigned hereby elects to reject the terms, conditions and provisions of an act for the payment of compensation as provided by (chapter one hundred forty-seven of) the acts of the (thirty-fifth) general assembly and acts amendatory thereto, and elects to rely upon the common law as modified by section three of (chapter one hundred forty-seven of) the acts of the (thirty-fifth) general assembly for the right to recover for personal injury which I may receive, if any, growing out of and arising from the employment while in line of duty for my employer aboved named.

Dated this — day of —, 19—.

(Signed) ———.

STATE OF IOWA,

—— County, ss:

The undersigned being first duly sworn deposes and says that the written notice was on the — day of —, 19—, served on the within named employer of the undersigned by delivering to ——— a true, correct and verbatim copy thereof.

——— (Name of Person Served).

Subscribed and sworn (or affirmed) to before me by the said  
——— this — day of —, 19—.

———, Notary Public.

[fol. 150] In any case where an employe or one who is an applicant for employment elects to reject the terms, conditions and provisions of this act, he shall, in addition to the notice required by subdivision (b) of section three of this act, state in an affidavit to be filed with said notice who, if any person, requested, suggested, or demands of such person to exercise the right to reject the provisions of this act. And if request, suggestion, or demand has been made of such employe by any person, such employe shall give and state the name of the person who made the request, suggestion, or demand, and all of the circumstances relating thereto, the date and place when and where made, and persons present, and if it be found that the employer of such employe, or an employer to whom an applicant for employment, or any person a member of the firm, association, corporation, or agent or official of such employer, made a request, suggestion or demand of such employe or applicant for employment to reject the terms, conditions and provisions of this act, such request, suggestion or demand if made under such conditions, shall be conclusively presumed to have been sufficient to have unduly influenced such employe or an applicant for employment to exercise the right to reject the terms of this act, and the rejection made under such circumstances shall be conclusively presumed to have been procured

through fraud and thereby fraudulently procured, and such rejection shall be null and void and of no effect.

No person interested in the business of such employer, financially or otherwise, shall be permitted to administer the oath to the affidavit [fol. 151] required in case an employe or applicant for employment elects to exercise the right to reject the provisions of this act. And the person administering such oath in making such affidavit shall carefully read the notice and affidavit to such person making such rejection, and shall explain that the purpose of the notice is to bar such person from recovering compensation in accordance with the schedule and terms of this act in the event that he sustains an injury in the course of such employment; all of which shall be shown by certificate of the person administering the oath herein contemplated. The Iowa industrial commissioner, or any person acting for such commissioner, shall refuse to file the notice and affidavit, unless such notice, affidavit and certificate fully, and in detail, comply with the requirements hereof. And if such rejection, affidavit and certificate is found insufficient for any cause, (it) shall be returned by mail or otherwise to the person who executed the instrument.

**Sec. 2477-m3. Tenure of Election.**—(a) Until Provisions Complied With.—When the employer or employe has given notice in compliance with this act electing to reject the terms thereof such election shall continue and be in force until such employer or employe shall thereafter elect to come under the provisions of this act as is provided in subdivision (b) of this section.

(b) Notice—How Filed.—When an employer or employe rejects the terms, conditions or provisions of this act, such party may at any time thereafter elect to waive the same by giving notice in writing in the same manner required of the party in electing to reject the [fol. 152] provisions of the act and which shall become effective when filed with the Iowa industrial commissioner.

**Sec. 2477-m4. Liability of Employer After Election to Reject.**—Where the employer and employe elect to reject the terms, conditions and provisions of this act, the liability of the employer shall be the same as though the employe had not rejected the terms, conditions and provisions thereof.

**Sec. 2477-m5. Subsequent Election to Reject—Security for Compensation.**—An employer having come under this act, who thereafter elects to reject the terms, conditions and provisions thereof, shall not be relieved from the payment of compensation to such employe who sustains an injury in the course of the employment before the election to reject becomes effective; and in such cases the employer shall be required to secure the payment of any compensation due or that may become due to such workman, subject to the approval of the Iowa industrial commissioner.

**Sec. 2477-m6. Liability of Other Than That of Employer.**—Where an employe coming under the provisions of this act receives an injury for which compensation is payable under this act and

which injury was caused under circumstances creating a legal liability in some person other than the employer, to pay damages in respect thereof:

(a) Proceedings Against Both Parties.—The employe or beneficiary may take proceedings both against that person to recover damages and against the employer for compensation, but the amount of the compensation to which he is entitled under this act shall be reduced by the amount of damages recovered.

[fol. 153] (b) Indemnity—Subrogation.—If the employe or beneficiary in such case recovers compensation under this act, the employer by whom the compensation was paid or the party who has been called upon to pay the compensation, shall be entitled to indemnity from the person so liable to pay damages as aforesaid, and shall be subrogated to the rights of the employe to recover therefor.

Sec. 2477-m7. Contract to Relieve not Operative.—No contract, rule, regulation or device whatsoever shall operate to relieve the employer, in whole or in part from any liability created by this act except as herein provided.

Sec. 2477-m8. Notice of Injury—Form—Failure to Give.—Unless the employer or representative of such employer shall have actual knowledge of the occurrence of an injury, or unless the employe or someone on his behalf, or some of the dependents or someone on their behalf, shall give notice thereof to the employer within fifteen days of the occurrence of the injury, then no compensation shall be paid until and from the date such notice is given or knowledge obtained; but if notice is given or the knowledge obtained within thirty days from the occurrence of the injury, no want, failure or inaccuracy of a notice shall be a bar to obtaining compensation, unless the employer shall show that he was prejudiced by such want, defect or inaccuracy, and then only to the extent of such prejudice. Provided, that if the employe or beneficiary shall show that his failure to give prior notice was due to mistake, inadvertance, ignorance of fact or law, or inability, or to the fraud, misrepresentation or deceit of another or to any other reasonable cause or excuse, then compensation may be allowed unless and then to the extent only that the employer shall show that he was prejudiced by failure to receive such notice. Provided, further, unless knowledge is obtained or notice given within ninety days after the occurrence of the injury, no compensation shall be allowed. No form of notice shall be required but may substantially conform to the following form:

#### Form of Notice

To ——— :

You are hereby notified that on or about the — day of — 19—, personal injury was sustained by ——— while in your employ at — (give name of place employed and point where located when injury occurred), and that compensation will be claimed therefor.

(Signed) ———.

but no variation from this form of notice shall be material if the notice is sufficient to advise the employer that a certain employe, by name, received an injury in the course of his employment on or about a specified time at or near a certain place. Notice served upon one (upon) whom an original notice may be served in civil cases shall be a compliance with this act.

The notice required to be given to the employer may be served by any person over sixteen years of age, who shall make return upon a copy of the notice, properly sworn to, showing the date of service where and upon whom served, but no special form of the return of [fol. 155] service of the notice shall be required. It shall be sufficient if the facts therefrom can be reasonably ascertained. The return of service may be amended at any time.

Sec. 2477-m9. Compensation Schedule.—If any employe has not given notice to reject the terms, conditions and provisions of this act, or has given such notice and waived the same as by this act provided, and the employer has not rejected the terms, conditions and provisions of the act or has given such notice and waived the same and the employer receives a personal injury arising out of and in the course of the employment, compensation shall be paid as herein provided.

(a) The compensation provided for in this act shall be paid in accordance with the schedule unless otherwise provided.

(b) At the time of the injury and thereafter during the disability, but not exceeding four weeks of incapacity, the employer, if so requested by the employe, or any one for him, or if so ordered by the court or Iowa Industrial Commissioner shall furnish reasonable surgical, medical and hospital services, and supplies therefor, not exceeding one hundred (\$100.00) dollars. Provided, however, that in exceptional cases, an application may be made in writing to the Iowa Industrial Commissioner for additional surgical, medical and hospital services, and supplies therefor, in which case a copy of such application shall be mailed to the employer or his insurer. If such application is approved by the commissioner, then the employer shall [fol. 156] furnish such additional services and supplies for such period, and in such amount as the Iowa Industrial Commissioner shall order, but in no event to exceed one hundred (\$100.00) dollars.

(c) Where the injury causes death the compensation under this act shall be as follows:

The employer shall in addition to any other compensation pay the reasonable expense of the employe's last sickness and burial not to exceed one hundred dollars. If the employe leaves no dependents this shall be the only compensation.

(d) If death results from the injury, the employer shall pay the dependents of the employe wholly dependent upon his earnings for support at the time of the injury, a weekly payment equal to sixty per cent of his average weekly wages, but not more than fifteen (\$15.00) dollars nor less than six (\$6.00) dollars per week for a period of three hundred weeks.

(e) If the employe leaves dependents only partially dependent upon his earnings for support at the time of the injury, the weekly compensation to be paid as aforesaid shall be equal to the same proportion of the weekly payments for the benefit of persons wholly dependent as the amount contributed by the employe to such partial dependents bears to the annual earnings of the deceased at the time of the injury. When weekly payments have been made to an injured employe before his death, the compensation to dependents shall begin from the date of the last of such payments, but shall not continue more than three hundred weeks from the date of the injury.

(f) Where injury causes death to an employe, a minor, whose [fol. 157] earnings were received by the parent, the compensation to be paid the parent shall be two-thirds of the amount provided for payment in subdivision (d) section ten (nine).

(g) No compensation shall be paid for an injury which does not incapacitate the employe for a period of at least two weeks from earning full wages; provided, however, that this provision shall not apply to those injuries resulting in disability partial in character and permanent in quality and compensated according to the schedule found in section twenty-four hundred seventy-seven-m-9 (j) (2477-m-9-j), Supplement to the Code, 1913. Should such incapacity extend beyond a period of two weeks, compensation shall begin on the fifteenth day after the injury; provided, however, that if the period of incapacity extends beyond the thirty-fifth day following the date of the injury, then the compensation for the fifth week of incapacity shall be increased by adding thereto an amount equal to two-thirds ( $\frac{2}{3}$ ) of the weekly compensation; if the period of incapacity extends beyond the forty-second (42) day following the date of the injury, then the compensation for the sixth week of incapacity shall be increased by adding thereto an amount equal to two-thirds ( $\frac{2}{3}$ ) of the weekly compensation; if the period of incapacity extends beyond the forty-ninth (49) day following the date of the injury, then the compensation for the seventh week of incapacity shall be increased by adding thereto an amount equal to two-thirds ( $\frac{2}{3}$ ) of the weekly compensation; if the period of incapacity extends beyond the forty-ninth (49) day following the date of the injury, then the [fol. 158] compensation thereafter shall be only the weekly compensation provided for in this law.

(h) For injury producing temporary disability, sixty per cent of the average weekly wages received at the time of the injury, subject to a maximum compensation of fifteen dollars and a minimum of six dollars per week; provided, that if at the time of injury the employe receives wages less than six dollars per week, then he shall receive the full amount of wages per week. This compensation shall be paid during the period of such disability, not, however, beyond three hundred weeks.

(i) For disability total in character and permanent in quality, sixty per cent of the average weekly wages received at the time of

the injury, subject to a maximum compensation of fifteen dollars per week, and a minimum of six dollars per week, provided that if at the time of injury, the employe receives wages less than six dollars per week, then he shall receive the full amount of wages per week. This compensation shall be paid during the period of such disability, not, however, beyond four hundred weeks.

(j) For disability partial in character and permanent in quality, the compensation shall be as follows:

For all cases included in the following schedule, compensation shall be paid as follows, to-wit:

(1) For the loss of a thumb, sixty per cent of daily wages during forty weeks.

(2) For the loss of a first finger, commonly called the index finger, sixty per cent of daily wages during thirty weeks.

[fol. 159] (3) For the loss of a second finger, sixty per cent of daily wages during twenty-five weeks.

(4) For the loss of a third finger, sixty per cent of daily wages during twenty weeks.

(5) For the loss of a fourth finger, commonly called the little finger, sixty per cent of daily wages for fifteen weeks.

(6) For the loss of the first phalange of the thumb or of any finger shall be considered to be equal to the loss of one-half of such thumb or finger and compensation shall be one-half of the amounts above specified.

(7) The loss or more than one phalange shall be considered as the loss of the entire finger or thumb; provided, however, that in no case shall the amount received for more than one finger exceed the amount provided in this schedule for the loss of a hand.

(8) For the loss of a great toe, sixty per cent of daily wages during twenty-five weeks.

(9) For the loss of one of the toes other than the great toe, sixty per cent of daily wages during fifteen weeks.

(10) For the loss of the first phalange of any toe, shall be considered to be equal to the loss of one-half of such toe and the compensation shall be one-half of the amount above specified.

(11) The loss of more than one phalange shall be considered as the loss of the entire toe.

(12) For the loss of a hand, sixty per cent of daily wages during one hundred fifty weeks.

(13) The loss of two-thirds of that part of an arm between the shoulder joint and the elbow joint shall constitute the loss of an [fol. 160] arm, and the compensation therefore shall be sixty (60

per cent) of the average weekly wages during two hundred twenty-five (225) weeks.

(14) For the loss of a foot, sixty per cent of daily wages during one hundred twenty-five weeks.

(15) The loss of two-thirds of that part of a leg between the hip joint and the knee joint shall constitute the loss of a leg, and the compensation therefor shall be sixty (60 per cent) per cent of the average weekly wages during two hundred (200) weeks.

(16) For the loss of an eye, sixty per cent of daily wages during one hundred weeks.

(a) For the loss of a second or last eye, the other eye having been lost prior to the injury resulting in the loss of the second eye, sixty (60 per cent) per cent of the average weekly wages during two hundred (200) weeks.

(17) For the loss of hearing in one ear, sixty (60) per cent of daily wages during fifty (50) weeks, and for the loss of hearing in both ears, sixty (60) per cent of the daily wages during one hundred fifty (150) weeks.

(18) The loss of both arms, or both hands, or both feet, or both legs, or both eyes, or of any two thereof caused by a single accident, shall constitute total and permanent disability, to be compensated according to the provisions of section twenty-four hundred seventy-seven-m-9 (i) (2477-m-9-i), supplement to the code, 1913.

(19) In all other cases in this clause (j), the compensation shall bear such relation to the amount stated in the above schedule as the disability bears to those produced by the injuries named in the [fol. 161] schedule. Should the employe and employer be unable to agree upon the amount of compensation to be paid in cases not specifically covered by the schedule, the amount of compensation shall be settled according to provisions of this act as in other cases of disagreement.

(20) The amounts specified in this, clause (j) and subdivisions thereof, shall be subject to the same limitations as to maximum and minimum weekly payments as are stated in clause (h), section ten (nine) hereof.

Sec. 2477-m10. Death—Payment of Unpaid Balance.—Where an employe is entitled to compensation under this act for an injury received and death ensues from any cause not resulting from the injury for which he was entitled to the compensation, payments of the unpaid balance for such injury shall cease and all liability therefor shall terminate.

Sec. 2477-m11. Examination of Injured Employe—Suspension of Compensation.—After an injury, the employe, if so requested by his employer, shall submit himself for examination at some reasonable time and place within the state and as often as may be reasonably



requested, to a physician or physicians authorized to practice under the laws of this state, without cost to the employe; but if the employe request, he shall, at his own cost, be entitled to have a physician or physicians of his own selection to participate in such examination. The refusal of the employe to submit to such examination shall deprive him of the right to compensation during the continuance of such refusal. When a right to compensation is thus suspended no compensation shall be payable in respect to the period of suspension.

[fol. 162] Sec. 2477-m12. Contributions from Employes—No Reduction of Employer's Responsibility.—The compensation herein provided shall be the measure of the responsibility which the employer has assumed for injuries or death that may occur to employes in his employment subject to the provisions of this act, and it shall not be in any wise reduced by contribution from employes.

Sec. 2477-m13. Trustees for Minors and Those Mentally Incapacitated—Reports.—When an injured minor, employe or a minor dependent or one physically or mentally incapacitated from earning is entitled to compensation under this act, payment shall be made to a trustee appointed by the judge of the district court for each county in the respective judicial districts, and the money coming into the hands of the said trustees shall be expended for the use and benefit of the person entitled thereto under the direction and orders of the judge during term time or in vacation. The trustee shall make annual reports to the court of all money or property received and expended for each person, and for services rendered as trustee shall be paid such compensation by the county as the court may direct by written order directed to the auditor of the county who shall issue a warrant therefor upon the treasurer of the county in which the appointment is made. If the judge making the appointment deems it advisable, a trustee may be appointed to serve for more than one county in the district and the expenses shall be paid ratably by each county according to the amount of work performed in each county. The trustee shall qualify and give bond in such amount as the judge may direct, which may be increased or [fol. 163] diminished from time to time as the court may deem best. In case a deceased employe for whose injury or death compensation is payable leaves surviving him an alien dependent or dependents residing outside the United States, the consul-general, consul, vice-consul or consular agent of the nation of which the said dependent or dependents are citizens shall be regarded as the exclusive representative of such dependent or dependents. Such consular officer, or his duly appointed representative residing in the State of Iowa, shall have the exclusive right in behalf of such non-resident dependent or dependents to present, prosecute, litigate, adjust and settle all claims for compensation provided by this act, and to receive for distribution to such dependent or dependents all compensation arising thereunder.

Such consular officer or his duly appointed representative shall file with the industrial commissioner a copy of his exequatur or evidence of his authority and the industrial commissioner shall notify such



consular officer or his said representative of the death of all employees leaving alien dependent or dependents residing in the country of said consular officer so far as the same shall come to his knowledge, provided, however, that nothing herein shall abridge the right of any relative of such decedent who may reside in the State of Iowa to take out administration upon the estate of such decedent, and as such receive the funds due said estate; and provided further that before said consular agent or his representative shall have the right to receive funds due the estate of said decedent he shall regularly take out administration in the county where decedent last resided, [fol. 164] and give bond as administrator for the protection of such funds as provided by law.

**Sec. 2477-m14. Commutation of Future Payments—Discretion of Court.**—In any case where the period of compensation can be determined definitely either party may, upon due notice to the other, apply to any judge of the district court for the county in which the accident occurred for an order commuting further payments to a lump sum; provided, however, that no judge of the district court shall consider any such application until there is endorsed thereon by the Iowa Industrial Commission his approval of such commutation, and no order shall be issued by such judge contrary to the endorsement of said Industrial Commissioner. And such judge may make such an order when it shall be shown to his satisfaction that the payment of a lump sum in lieu of future monthly or weekly payments, as the case may be, will be for the best interest of the person or persons receiving or dependent upon said compensation, or that the continuance of periodical payments will, as compared with lump sum payments, entail undue expense or undue hardship upon the employer liable therefor. Where the commutation is ordered, the court shall fix the lump sum to be paid at an amount which will equal the total sum of the probable future payments capitalized at their present value and upon the basis of interest, calculated at five per cent per annum. Upon the payment of such amount the employer shall be discharged from all further liability on account of such injury or death, for which said compensation was being paid, and be entitled to a duly executed release, upon filing [fol. 165] which the liability of such employer under any agreement, award, finding or judgment shall be discharged of record.

**Sec. 2477-m15. Schedule of Computation.**—The basis for computing compensation provided for in this act shall be as follows:

(a) The compensation shall be computed on the basis of the annual earnings which the injured person received as salary, wages or earnings in the employment of the same employer during the year preceding the injury.

(b) Employment by the same employer shall be taken to mean employment by the same employer in the grade in which the employee was employed at the time of the accident, uninterrupted by absence from work due to illness or any other unavoidable cause.

(c) The annual earnings, if not otherwise determinable, shall be regarded as three hundred times the average daily earnings in such computation.

(d) If the injured person has not been engaged in the employment for a full year immediately preceding the accident, the compensation shall be computed according to the annual earnings which persons of the same class in the same or in neighboring employments of the same kind have earned during such period. And if this basis of computation is impossible, or should appear to be unreasonable, three hundred times the amount which the injured person earned on an average of those days when he was working during the year next preceding the accident, shall be used as a basis for the computation.

(e) In case of injured employes who earn either no wages or [fol. 166] less than three hundred times the usual daily wage or earnings of the adult day laborer in the same line of industry of that locality, the yearly wage shall be reckoned as three hundred times the average daily local wages of the average wage earner in that particular kind or class of work; or if information of that class is not obtainable, then of the class or kindred or similarity in the same general employment in the same neighborhood.

(f) As to employes employed in a business or enterprise which customarily shuts down and ceases operation during a season of each year, the number of working days which it is the custom of such business or enterprise to operate each year shall be used instead of three hundred as a basis for computing the annual earnings provided the minimum number of days which shall be used as a basis for the year's work shall not be less than two hundred.

(g) Earnings, for the purpose of this action, shall be based on the earnings for the number of hours commonly regarded as a day's work for that employment, and shall exclude overtime earnings. The earnings shall not include any sum which the employer has been accustomed to pay the employe to cover any special expense entailed on him by the nature of the employment.

(h) In computing the compensation to be paid to any employe who, before the accident for which he claims compensation, was disabled and drawing compensation under the terms of this act, the compensation for each subsequent injury shall be apportioned according to the proportion of incapacity and disability caused by the respective injuries which he may have suffered.

[fol. 167] Sec. 2477-m16. Terms Defined.—In this act unless the context otherwise requires:

(a) "Employer" includes and applies to any person, firm, association or corporation, and includes state, counties municipal corporations, cities under special charter and under commission form of government and shall include school districts and the legal repre-

sentatives of a deceased employer. Whenever necessary to give effect to section seven of this act it includes a principal or intermediate contractor.

(b) "Workman" is used synonymously with "employee," and means any person who has entered into the employment of, or works under contract of service, express or implied, or apprenticeship for an employer, except a person whose employment is purely casual or not for the purpose of the employer's trade or business or those engaged in clerical work only, but clerical work shall not include one who may be subjected to the hazards of the business, or one holding an official position or standing in a representative capacity of the employer, or official elected or appointed by the state, county, school district, municipal corporation, cities under special charter and commission form of government; provided that one who sustains the relation of contractor with any person, firm, association, corporation or the state, county, school district, municipal corporation, cities under special charter or commission form of government, shall not be considered an employee thereof.

The term "workman" shall include the singular and plural of both sexes. Any reference to a workman who has been injured [fol. 168] shall, where the workman is dead, include a reference to his dependents as herein defined, legal representatives or where the workman is a minor or incompetent to his guardian or next friend.

(c) The following shall be conclusively presumed to be wholly dependent upon a deceased employee:

(1) The surviving spouse, unless it be shown that the survivor wilfully deserted deceased without fault upon the part of the deceased; and if it be shown that the survivor deserted deceased without fault upon the part of deceased, the survivor shall not be regarded as a dependent in any degree. No surviving spouse shall be entitled to the benefits of this act unless she shall have been married to the deceased at the time of the injury, and should the deceased employee leave no dependent children, and should the surviving spouse remarry, then all compensation payable to her shall terminate on the date of such remarriage.

(2) A child or children under sixteen years of age (and over said age if physically or mentally incapacitated from earning) whether actually dependent for support or not upon the parent at the time of his or her death.

(3) A parent of a minor entitled to the earnings of the employee at the time when the injury occurred, subject to provisions of subdivision (f), section ten (nine) hereof.

(4) If the deceased employee leaves dependent surviving spouse, the full compensation shall be paid to such spouse; but if the dependent surviving spouse dies before payment is made in full, the balance remaining shall be paid to the person or persons wholly dependent, if any, share and share alike. If there be no person or

[fol. 169] persons wholly dependent, then payment shall be made to partial dependents.

(5) In all other cases, questions of dependency in whole or in part shall be determined in accordance with the fact as the fact may be at the time of the injury; and in such other cases if there is more than one person wholly dependent, the death benefit shall be equally divided among them, and persons partially dependent, if any, shall receive no part thereof. If there is no one wholly dependent and more than one person partially dependent the death benefit shall be divided among them according to the relative extent of their dependency. Provided, however, that when a lump sum is paid as contemplated by this act, the court or commissioner, in making distribution thereof, shall take into consideration the contingent rights of partial beneficiaries or the rights of those who may become such after a wholly dependent child or children become sixteen years of age.

(6) Step-parents shall be regarded in this act as parents.

(7) Adopted child or children or step-child or children shall be regarded in this act the same as if issue of the body.

(d) "Injury" or "personal injury" includes death resulting from injury.

(e) The words "personal injury arising out of and in the course of such employment" shall include injuries to employes whose services are being performed on, in or about the premises which are occupied, used or controlled by the employer, and also injuries to [fol. 170] those who are engaged elsewhere in places where their employer's business requires their presence and subjects them to dangers incident to the business.

(f) The words "injury" and "personal injury" shall not include injury caused by the wilful act of a third person direct against an employe for reasons personal to such employe or because of his employment.

(g) They shall not include a disease except as it shall result from the injury.

(h) The word "court" whenever used in this act unless the context shows otherwise, shall be taken to mean the district court.

Sec. 2477-m17. Insurance Against Compensation Prohibited—Penalty—(a) Any contract of employment, relief benefit or insurance or other device whereby the employe is required to pay any premium or premiums for insurance against the compensation provided for in this act shall be null and void; and any employer withholding from the wages of any employe any amount for the purpose of paying any such premium shall be guilty of a misdemeanor and punishable by a fine not less than ten dollars nor more than fifty dollars for each offense, in the discretion of the court.

No employe or beneficiary shall have power to waive any of the provisions of this act in regard to the amount of compensation which may be payable to such employe or beneficiary hereunder to whom the act applies.

Sec. 2477-m18. Contract Respecting Claim for Injury Deemed Fraudulent.—Any contract or agreement made by any employer or his agent or attorney with any employe or any other beneficiary [fol. 171] of any claim under the provisions of this act within twelve days after the injury shall be presumed to be fraudulent.

Sec. 2477-m20. Attorney's Lien—Subject to Approval.—No claim of an attorney at law for services in securing a recovery under this act shall be an enforceable lien thereon unless the amount of the same be approved in writing by a judge of a court of record or the Iowa Industrial Commissioner, which approval may be made in term time or vacation.

Sec. 2477-m21. Applicable to Intrastate and Interstate Commerce.—The provisions of this act shall apply to employers and employes as defined in this act engaged in intra-state commerce and also those engaged in inter-state or foreign commerce for whom a rule or method of compensation has been or may be established by the Congress of the United States, only to the extent that their mutual connection with intra-state work or foreign commerce shall be clearly separable and distinguishable from inter-state or foreign commerce; provided, that any such employer and workman of such employer working only in this state may, subject to the approval of the Iowa Industrial Commissioner, and so far as not forbidden by any act of Congress or permitted, voluntarily by written agreement, accept and become bound by the provisions of this act in like manner and with the same force and effect in every respect as by this act provided for other employers and employes.

[fol. 172]

## Part II

Sec. 2477-m22. Iowa Industrial Commissioner—Appointment—Term.—There is hereby created the office of Iowa industrial commissioner, to be appointed by the governor, by and with the consent of the senate. The term of office of the commissioner shall be six years. An appointment may be made to fill a vacancy or otherwise when the senate is not in session, but shall be acted upon at the next session thereof.

The Iowa industrial commissioner shall appoint a deputy, for whose acts he shall be held responsible, who shall hold office during the pleasure of said industrial commissioner. Such appointment shall be made in writing, and must be approved by the executive council of the State of Iowa. The deputy, in the absence or disability of the Iowa industrial commissioner, shall have all the powers and perform all of the duties of the industrial commissioner pertaining to his office, and shall receive an annual salary of twenty-four hundred dollars, payable in equal monthly installments out of the state

treasury and in the same manner as are the salaries of other state officials.

Sec. 2477-m23. Salary—Expenses—Office—Seal—Assistants—Accounts—Political Activity—Annual Appropriation.—The salary and actual necessary expenses of the commissioner shall be paid by the state, and he shall be provided with adequate and necessary office rooms, furniture, equipment, supplies and other necessities in the transaction of the business. The annual salary of the commissioner shall be thirty-three hundred dollars. The commissioner, by and [fol. 173] with the consent of the executive council, may fix the salary and appoint a secretary and other assistants and clerical help as may be required and needed, provided, that the salary of the secretary shall not exceed eighteen hundred dollars per annum. The salary and actual personal expense account of the commissioner shall be itemized and sworn to and filed as other current bills as provided by statute, and warrant therefor shall be issued by the auditor upon the treasurer of the state for the payment thereof at the end of each calendar month; provided, however, that the expense account may be audited, allowed and paid at the end of each week. The commissioner shall provide himself with a seal, which shall be used to authenticate his orders, decisions and other proceedings deemed necessary, upon which shall be inscribed the words "Iowa Industrial Commissioner's Seal" and the date of organization. All other accounts made by, through or under the commissioner for salaries (and) expenditures, unless otherwise by this act provided, shall be itemized and sworn to by the parties entitled thereto, audited by the commissioner, attested by the secretary, filed as other bills are required by statute, and a warrant shall issue therefor by the auditor of state upon the treasurer, who shall pay the same out of the funds appropriated for the use of the commissioner as by this act provided. The salaries of all persons under the commissioner shall be audited, allowed and paid at the end of each month, and expense accounts may be audited, allowed and paid at the end of each week. The commissioner shall have the power to remove the secretary or any [fol. 174] other person appointed to an office by him at any time the commissioner may see fit.

It shall be unlawful for any appointee by the commissioner to espouse the election or appointment of any candidate for or to any political office, or contribute to the campaign fund of any political party, or to the campaign fund of any person who is a candidate for election or appointment to any political office, and any person performing the duties as an appointee under the commissioner violating the provisions of this act shall be sufficient cause for dismissal and removal from office.

Before entering upon his duties the commissioner shall qualify by taking the oath of his office, that he will support the constitution of the United States and of the State of Iowa, and will faithfully and impartially, without fraud, fear or favor, discharge the duties of his office incumbent upon him, as provided by the law of the state of Iowa, to the best of his ability and understanding.



There is hereby appropriated out of any money not otherwise appropriated for the use of the commissioner, as contemplated within the terms of this act or acts amendatory thereof, or other statutes relating to the commissioner, his duties and responsibilities empowered by law, the sum of twenty thousand dollars annually, and in addition thereto the executive council shall provide and furnish the commissioner with such printing as may be necessary in the transaction of the business within the contemplation of the law.

Sec. 2477-m24. Powers—Rules—Witnesses—Reports.—The commissioner may make rules and regulations not inconsistent with this [fol. 175] act for carrying out the provisions of the act. The employer shall furnish upon request of an injured employe or dependent or any legal representative acting for such person, a statement of the earnings, wages, or salary and other matters relating to such earnings, wages, or salary during the year or part of the year that such employe was in the employment of such employer for the year preceding the injury. Provided, however, that not more than one report shall be required for each on account of any one injury. Process and procedure under this act shall be as summary as reasonably may be. While sitting as an arbitration committee, or when conducting a hearing upon review, or in the making of any investigation or inquiry, neither the commissioner nor the arbitration committee shall be bound by common law or statutory rules of evidence, or by technical or formal rules of procedure, but may hold such arbitrations or conduct such hearings and make such investigations and inquiries in the manner best suited to ascertain the substantial rights of the parties. The commissioner shall have the power to subpoena witnesses, administer oaths and to examine such books and records of the parties to a proceeding or investigation as relate to questions in dispute or under investigation. The fees for attending as a witness before the industrial commissioner shall be one dollar and fifty cents per diem; for attending before an arbitration committee, one dollar per diem; in both cases five cents per mile for traveling to and from the place of hearing. The district court is hereby empowered to enforce by proper proceedings the provisions of this section relating to the attendance and testimony of witnesses and the examination of books and records. The deposition of any witnesses may be taken and used as evidence in any hearing pending before a board of arbitration in workmen's compensation proceeding in connection herewith. That such deposition shall be taken in the same manner as provided for the taking of depositions in the district court, and when so taken shall be admissible in evidence in such hearings in the same manner subject to the same rules governing the admission of evidence in the district court. Application for permission to take depositions in such case shall be filed in the district court of the county wherein the case for arbitration shall be heard. The commissioner shall make biennial reports to the governor who shall transmit the same to the general assembly, in which, among other

things, the commissioner shall recommend such changes in the law covered by this act as he may deem necessary.

Sec. 2477-m25. Compensation Agreements—Approval.—If the employer and the employe reach an agreement in regard to the compensation under this act, a memorandum thereof shall be filed with the Iowa industrial commissioner by the employer or employe, and unless the commissioner shall, within twenty days, notify the employer and employe of his disapproval of the agreement by registered letter sent to their addresses as given on the memorandum filed, the agreement shall stand as approved and be enforceable for all purposes under the provisions of this act. In case the injured [fol. 177] employe is a minor, either he or the trustee provided for in section twenty-four hundred seventy-seven-m-13 (2477-m-13), supplement to the code, 1913, may execute the memorandum of agreement provided for herein, and may give a valid and binding release for the compensation paid on his account under the terms of this act. Such agreement shall be approved by said commissioner only when the terms conform to the provisions of this act.

Sec. 2477-m26. Committee of Arbitration.—If the employer and the injured employe or representatives or dependents fail to reach an agreement in regard to compensation under this act, either party may notify the industrial commissioner, who shall thereupon call for the formation of a committee of arbitration. The arbitration committee shall consist of three persons, one of whom shall be the industrial commissioner who shall act as chairman. The other two shall be named, respectively, by the two parties. If a vacancy occurs it shall be filled by the party whose representative is unable to act.

Sec. 2477-m27. Oath of Arbitrators.—The arbitrators appointed by the parties shall be sworn by the chairman to take the following oath:

I, ———, do solemnly swear (or affirm) that I will faithfully perform my duties as arbitrator and will not be influenced in my decision by any feeling of friendship or partially toward either party.  
(Signed) ———.

Sec. 2477-m28. Appointment of Arbitrators.—It shall be the duty of the industrial commissioner, upon notification that the parties have failed to reach an agreement, to request both parties to appoint [fol. 178] their respective representatives on the committee of arbitration. The commissioner shall act as chairman, and, if either party does not appoint its member on this committee within seven days after notification as above provided, or after a vacancy has occurred, the commissioner shall fill the vacancy and notify the parties to that effect.

Sec. 2477-m29. Powers of Committee—Hearings—Decisions.—The committee of arbitration shall make such inquiries and investigations as it shall deem necessary. The hearings of the committee shall be in the city, town or place where the injury occurred, if



within the state. If the injury occurred outside this state the hearings of the committee shall be held in the county seat of this state which is nearest to the place where the injury occurred unless the interested parties and the Iowa Industrial Commissioner mutually agree by written stipulation that the same may be held at some other place. The decision of the committee, together with the statement of evidence submitted before it, its findings of fact, rulings of law and any other matters pertinent to questions arising before it shall be filed with the Industrial Commissioner. Unless a claim for review is filed by either party within five days from the date of filing the decision with said Commissioner, such decision shall be enforceable under the provisions of this chapter.

Sec. 2477-m30. Examination by Physician—Fee—Evidence.—The industrial commissioner may appoint a duly qualified impartial physician to examine the injured employe and make report. The fee for this service shall be five dollars, to be paid by the industrial [fol. 179] commissioner, together with traveling expenses, but the commissioner may allow additional reasonable amounts in extraordinary cases. Any physician so examining any injured employe shall not be prohibited from testifying before the Iowa industrial commissioner or any other person, commission or court, as to the results of his examination or the condition of the injured employe.

Sec. 2477-m31. Compensation of Arbitrators—Costs.—The arbitrators named by or for the parties to the dispute shall each receive five dollars as a fee for his services, but the industrial commissioner may allow additional reasonable amounts in extraordinary cases. The fees shall be paid by the employer who may deduct an amount equal to one-half of the sum from any compensation found due the employe. And all other costs incurred in the hearing before the board of arbitration shall be taxed to the losing party, or an equitable apportionment made thereof by the committee according to the facts.

Sec. 2477-m32. Review—Second Hearing.—If a claim for review is filed, the industrial commissioner shall hear the parties and may hear evidence in regard to any or all matters pertinent thereto and may revise the decision of the committee in whole or in part, or may refer the matter back to the committee for further findings of fact, and shall file its decision with the records of the proceedings and notify the parties thereof. No party shall as a matter or right be entitled to a second hearing upon any question of fact.

Sec. 2477-m33. Any party in interest may present a certified copy [fol. 180] of an order or decision of the commissioner, or an award of an arbitration committee from which no claim for review has been filed within the time allowed therefor, or a memorandum of agreement approved by the commissioner, and all papers in connection therewith, to the district court of the county in which the injury occurred, whereupon said court shall render a decree in accordance therewith and notify the parties. Such decree, in the absence of an appeal from the decision of the industrial commissioner, shall have

the same effect and in all proceedings in relation thereto shall thereafter be the same as though rendered in a suit duly heard and determined by said court. Upon the presentation to the court of a certified copy of a decision of the industrial commissioner, ending, diminishing or increasing a weekly payment under the provisions of this act, the court shall revoke or modify the decree to conform to such decision.

No order or award of an arbitration committee is appealable direct to the courts, but if any party in interest is aggrieved thereby, he may within five (5) days from the date thereof apply to the industrial commissioner for a review of the same by such industrial commissioner in the manner as hereinbefore provided. If any such party is aggrieved by reason of an order or decree of the Iowa industrial commissioner, such party may appeal therefrom to the district court of Iowa, only in the manner and upon the grounds following:

Within thirty (30) days from the date of such order or decree of the industrial commissioner, the party aggrieved may file an application in writing with the Iowa industrial commissioner asking for [fol. 181] an appeal from such order or decree, stating generally the grounds upon which such appeal is sought. In the event such application is filed as hereinbefore provided, the industrial commissioner shall, within thirty days from the filing of same, cause certified copies of all documents and papers then on file in his office in the matter, and a transcript of all testimony taken therein, to be transmitted with his findings and order or decree to the clerk of the district court of Iowa in and for that county wherein the injury occurred. The application for such appeal may thereupon be brought on for hearing before said district court upon such record by either party on ten (10) days' written notice to the other; subject, however, to the provisions of law for a change of the place of trial or the calling of another judge. The findings of fact made by the industrial commissioner within his powers shall, in the absence of fraud, be conclusive, but upon such hearing the court may confirm or set aside such order or decree of the industrial commissioner, if he finds:

(1) That the industrial commissioner acted without or in excess of his powers; or

(2) That the order or decree was procured by fraud; or

(3) That the facts found by the industrial commissioner do not support the order or decree.

(4) That there is not sufficient competent evidence in the record to warrant the industrial commissioner in making the order or decree complained of.

No order or decree of the industrial commissioner shall be set [fol. 182] aside by the court upon other than the grounds just stated.

Upon the setting aside of any such order or decree, the court may recommit the controversy to the industrial commissioner for further hearing or proceedings, or it may enter the proper judgment upon the findings, as the nature of the case may demand. Such decree shall have the same effect and in all proceedings in relation thereto shall thereafter be the same as though rendered in a suit duly heard and determined by said court. An abstract of the judgment entered by the trial court upon the appeal from any order or decree shall be made by the clerk thereof upon the docket entry of any judgment which may hereinbefore have been rendered upon it. Such order or decree and transcript of such abstract may thereupon be obtained for like entry upon the dockets of the courts of other counties within the state.

Any party in interest who is aggrieved by a judgment entered by the district court upon the appeal of an order or decree, may appeal therefrom within the time and in the manner provided for in appeal from the orders, judgments and decrees of the district court of Iowa; but all such appeals shall be placed on the calendar of the supreme court and brought to a hearing in the same manner as criminal causes on such calendar.

No fee shall be charged by the clerk of any district court for the performance of any official service required by this act, except for the docketing of judgments and for certified copies or transcripts thereof. In proceeding on appeal from an order or decree, costs as between the parties shall be allowed or not in the discretion of the court.

[fol. 183] Sec. 2477-m34. Review of Payment—Notice.—(a) Any payment required to be made under this act, which has not been commuted, may be reviewed by the industrial commissioner at the request of the employer or of the employe, and if on such review the commissioner finds the condition of the employe warrants such action, he may end, diminish or increase the compensation, subject to the maximum or minimum amounts provided for in this act. All hearings upon review of the Iowa Industrial commissioner under the provisions of this section, or under section twenty-four hundred seventy-seven-m-32 (2477-m-32), supplement to the code, 1913, shall be held at Des Moines, Iowa, unless the interested parties and the Iowa industrial commissioner mutually agree by written stipulation that the same may be held at some other place.

Upon the presentation to the court of a certified copy of a decision of the industrial commissioner ending, diminishing or increasing a weekly payment under the provisions of this act, the court shall revoke or modify any judgment or decree then on record in his court to conform to such decision.

(b) Any notice to be given by the commissioner or court provided for in this act shall be in writing but service thereof shall be sufficient if registered and deposited in the mail, addressed to the last known address of the parties.

Sec. 2477-m35. Fees Subject to Approval.—Fees of attorneys and physicians for services under this act shall be subject to the approval of the industrial commissioner unless otherwise provided in this act.

[fol. 184] Sec. 2477-m36. Reports by Employers—Records—Inspection.—Every employer shall hereafter keep a record of all injuries, fatal or otherwise, sustained by his employes in the course of their employment and resulting in incapacity for a longer period than one day. Within forty-eight hours, not counting Sundays and legal holidays, after the employer has knowledge of the occurrence of an accident resulting in personal injury causing incapacity for a longer period than one day, a report shall be made in writing by the employer to the industrial commissioner on blanks to be procured from the commissioner for that purpose.

Upon the termination of the disability of the injured employe, or if such disability extends beyond a period of sixty days, at the expiration of such period, the employer shall make a supplemental report on blanks to be procured from the commissioner for that purpose. The said reports shall contain the name and nature of the business of the employer, the location of the establishment, the name, age, sex and occupation of the injured employe, and shall state the date and hour of the accident, the nature and cause of the injury, and such other information as may be required by the commissioner. Any employer who refuses or neglects to make the report required by this section shall be punished by a fine of not more than fifty dollars for each offense.

All books, records and pay rolls of the employers, coming under this act showing or reflecting in any way upon the amount of wage expenditure of such employer, shall always be open for inspection by the industrial commissioner, or any of his representatives pre-[fol. 185] senting a certificate of authority from said commissioner for the purpose of ascertaining the correctness of the wage expenditure; the number of men employed and such other information as may be necessary for the uses and purposes of the commissioner in his administration of the law. But information obtained within the contemplation of this act shall be used for no other purpose than the information of the commissioner or insurance association with reference to the duties imposed upon such commissioner. A refusal on the part of the employer to submit his books, records or pay rolls for the inspection of the commissioner, or his authorized representatives presenting written authority from the commissioner, shall subject the employer to a penalty of one hundred dollars for each such offense, to be collected by civil action in the name of the state, and paid into the state treasury.

Sec. 2477-m37. Political Activity and Contributions Prohibited—Penalty.—It shall be unlawful for the commissioner, during his term of office, to serve upon any committee of any political party or espouse the election or appointment of any person for any political office or contribute to any campaign fund of any political party, or to the campaign fund of any person who is a candidate for election or appointed to any political office. A violation of this section

shall be deemed a misdemeanor and upon conviction shall be fined one hundred dollars.

Sec. 2477-m38. Candidate for Commissioner—Political Promises Prohibited—Penalty.—It shall be unlawful for any person who is a candidate for the appointment as commissioner to make any [fol. 186] promise to another, expressed or implied, in consideration of any assistance or influence given or recommendation made that the candidate will, if appointed as commissioner, vote to appoint such person or one whom he may recommend to an office within the power of the commissioner to appoint. A violation thereof shall be deemed a misdemeanor and upon conviction thereof shall be fined one hundred dollars.

Sec. 2477-m39. Recommendations of Candidates to be in Writing—Record—Public Inspection—Financial Interest Prohibited—Penalty.—All recommendations made by any person to the commissioner asking the appointment of another as commissioner shall be reduced to writing signed by the person presenting the same, which shall be filed by the governor in his office and open at all reasonable times for public inspection, and all recommendations made by any person to the commissioner for the appointment of another within the power of the commissioner to appoint, shall be reduced to writing, signed by the person presenting the same and filed by the commissioner and open for public inspection at all reasonable times and hours. If any person recommending the appointment of another within the contemplation of this act refuse to reduce the same to writing, it shall be the duty of the person to whom the recommendation is made, to make a brief memorandum thereof, stating the name of the person recommended and the name of the person who made the same, which shall be filed as by this act in other cases provided. It shall be unlawful for the commissioner to be financially interested in any business enterprise coming [fol. 187] under or affected by this act during his term of office, and if he offend this statute, it shall be sufficient grounds for his removal from office and in such case the governor shall at once declare the office vacant and appoint another to fill the vacancy.

Sec. 2477-m40. Removal from Office—Filing of Charges—Executive Council Shall Hear.—The governor shall remove from office the commissioner on the grounds of inefficiency, neglect of duty, or malfeasance in office, upon written charges having been filed with the executive council and sustained by proofs; but written notice of such charges, together with a copy thereof, shall be served upon the accused ten days before the time fixed for hearing. The executive council shall have jurisdiction to hear the case, and shall make such finding in accordance with justice and the law. The finding shall be reduced to writing, and report and finding filed with the governor.

### Part III

Sec. 2477-m41. Insurance of Liability.—Every employer, subject to the provisions of this act, shall insure his liability thereunder in

some corporation, association or organization approved by the state department of insurance. Every such employer shall within thirty days after this act goes into effect exhibit on demand of the state insurance department evidence of his compliance with this section; and if such employer refuses or neglects to comply with this section, he shall be liable in case of injury to any workman in his employ [fol. 188] under the common law as modified by statute, and in the same manner and to the same extent as though such employer had legally exercised his right to reject the compensations provisions of chapter eight-a (8-a), title XII, supplement to the code, 1913.

Any employer who fails to insure his liability as required herein shall post and keep posted a sign of sufficient size and so placed as to be easily seen by his employees in the immediate vicinity where working, which sign shall read as follows:

#### Notice to Employees

You are hereby notified that the undersigned employer has failed to insure his liability to pay compensation as required by law, and that because of such failure he is liable to his employees in damages for personal injuries sustained by his employees in the same manner and to the same extent as though he had legally exercised his right to reject the compensation provisions of chapter eight-a (8-a), title XII, supplement to the code, 1913.

(Signed) ———.

Any employer coming under the provisions of this act who fails to comply with this section or to post and keep posted the above notice in the manner and form herein required shall be guilty of a misdemeanor.

Sec. 2477-m42. Mutual Companies—Conditions.—For the purpose of complying with the foregoing section, groups of employers by themselves or in an association with any or all of their workmen, [fol. 189] may form insurance associations as hereafter provided, subject to such reasonable conditions and restrictions as may be fixed by the state insurance department and membership in such mutual insurance organization as approved, together with evidence of the payment of premium due, shall be evidence of compliance with the preceding section.

Sec 2477-m43. Benefit Insurance—Approval.—Subject to the approval of the Iowa Industrial Commissioner, any employer or group of employers may enter into or continue an agreement with his or their workmen to provide a scheme of compensation, benefit or insurance in lieu of the compensation and insurance provided by this act; but such scheme shall in no instance provide less than the benefits here secured, nor vary the period of compensation provided for disability or for death, or the provisions of this act with respect to periodic payments, or the percentage that such payments shall bear to weekly wages, except that the sums required may be increased; provided, further that the approval of the Iowa industrial



commissioner shall be granted, if the scheme provides for contribution by workmen, only when it confers benefits in addition to those required by this act commensurate with such contributions.

Sec. 2477-m44. Certificate of Approval.—Whenever such scheme or plan is approved by the Iowa Industrial Commissioner, he shall issue a certificate to that effect, whereupon it shall be legal for such employer, or group of employers, to contract with any or all of his or their workmen to substitute such scheme or plan for the provisions of this act during a period of time fixed by said department.

[fol. 190] Sec. 2477-m45. Termination—Appeal to District Court.—Such scheme or plan may be terminated by the Iowa Industrial Commissioner on reasonable notice to the interested parties if it shall appear that the same is not fairly administered, or if its operation shall disclose latent defects threatening its solvency, or if for any substantial reason it fails to accomplish the purpose of this act, but from any such order of said Iowa Industrial Commissioner the parties affected, whether employer or workman, may upon the giving of proper bond to protect the interests involved, appeal for equitable relief to the district court of this state.

Sec. 2477-m46. Maximum Commission or Compensation for Reinsurance.—No insurer of any obligation under this act shall either by himself or through another, either directly or indirectly, charge or accept as a commission or compensation for placing or renewing any insurance under this act more than fifteen per cent of the premium charged.

Sec. 2477-m47. Policy Requirements.—Every policy issued by any insurance corporation, association or organization to assure the payment of compensation under this act shall contain a clause providing that between any employer and the insurer, notice to and knowledge of the occurrence of injury or death on the part of the insured shall be notice and knowledge on the part of the insurer; and jurisdiction of the insured for the purpose of this act shall be jurisdiction of the insurer and the insurer shall be bound by every agreement, adjudgment, award or judgment rendered against the insured.

[fol. 191] Sec. 2477-m48. Insolvency Clause Prohibited—Lien of Insured.—No policy of insurance issued under this act shall contain any provision relieving the insurer from payment if the insured becomes insolvent or discharged in bankruptcy during the period that the policy is in operation, or the compensation, or any part of it, is due and unpaid. Every policy shall provide that the workman shall have a first lien upon any amount becoming due on account of such policy to the insured from the insurer, and that in case of the legal incapacity, inability or disability of the insured to receive the amount due and pay it over to the insured workman, or his dependents, said insurer shall pay the same directly to such workman, his agent, or to a trustee for him or his dependents, to the extent

of discharging any obligation of the insured to said workman or his dependents.

Sec. 2477-m49. Proof of Solvency—Revocation of Approval.—Where an employer coming under this act furnishes proofs to the insurance department satisfactory to the insurance department and Iowa Industrial Commissioner, of such employer's solvency and financial ability to pay the compensation and benefits as by this act provided and to make such payments to the parties when entitled thereto, or when such employer deposits with such insurance department security satisfactory to such insurance department and the Iowa Industrial Commissioner as will secure the payment of such compensation such employer shall be relieved of the provisions of section forty-two of this act; provided that such employer shall from [fol. 192] time to time, as may be required by such insurance department and Iowa Industrial Commissioner, furnish such additional proof of solvency and financial ability to pay as by this section of this act provided.

The insurance department and Iowa Industrial Commissioner may at any time, upon reasonable notice to such employer and upon hearing, revoke for cause any order or approval theretofore made, as by this act provided and within the contemplation of this section.

### **Defendant's Exhibit H**

Elder vs. C., R. I. & P. 3-3-24

BEFORE THE IOWA INDUSTRIAL COMMISSIONER OF IOWA

THE CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, Employer, Applicant,

vs.

FRED ELDER, Employer, Respondent

### **COMMISSIONER'S CERTIFICATE**

To whom it may concern:

I, A. B. Funk, hereby certify that I am the duly appointed and qualified Industrial Commissioner of Iowa.

That I am the legal custodian of the official records in the State [fol. 193] of Iowa pertaining to the provisions of the Workmen's Compensation Law of said state.

I further certify:

That Exhibit 1, attached hereto, is a true and correct copy of the Application for Arbitration which was filed in my office in connection with the above entitled case on January 5, 1924.

That Exhibit 2, attached hereto, is a true and correct copy of Respondent's Answer which was filed in my office in connection with the above entitled case on January 11, 1924.



That Exhibit 3, attached hereto, is a true and correct copy of Respondent's Plea in Abatement which was filed in my office in connection with the above entitled case on January 11, 1924.

That Exhibit 4, attached hereto, is a true and correct copy of Respondent's Motion for Continuance which was filed in my office in connection with the above entitled case on January 26, 1924.

That Exhibit 5, attached hereto, is a true and correct copy of the Ruling on the Motion for Continuance in connection with the above entitled case which was made and filed by the Iowa Industrial Commissioner on January 26, 1924.

That Exhibit 6, attached hereto, is a true and correct copy of the Ruling on Plea in Abatement and Motion for Continuance which was made and filed by the Iowa Industrial Commissioner on February 4, 1924.

That Exhibit 7, attached hereto, is a true and correct copy of a stipulation entered into by the parties of the above entitled case and filed in the office of the Iowa Industrial Commissioner to the effect that the Arbitration Hearing would be had at Des Moines, Iowa instead of at Chariton, Iowa.

[fol. 194] That Exhibit 8, attached hereto, is a true and correct copy of Applicant's Designation of Arbitrator which was filed in my office in connection with the above entitled case on February 9, 1924.

That Exhibit 9, attached hereto, is a true and correct copy of Stipulation for Submission Without Arbitrators which was filed in my office in connection with the above entitled case on February 11, 1924.

That Exhibit 10, attached hereto, is a true and correct copy of a stipulation entered into by the parties in connection with the above entitled case and filed in my office having to do with the ownership of certain railway cars referred to in the evidence submitted by this applicant.

That Exhibit 11, attached hereto, is a true and correct copy of the Arbitration Decision made by Deputy Iowa Industrial Commissioner, Ralph Young, and filed in my office in connection with the above entitled case on February 13, 1924.

That Exhibit 12, attached hereto, is a true and correct copy of Respondent's Application for Review which was filed in my office in connection with the above entitled case on February 16, 1924.

That Exhibit 13, attached hereto, is a true and correct copy of a letter written and mailed to Attorneys Davis and Michel, scheduling the Review Hearing in the above entitled case to be had in the office of the Iowa Industrial Commissioner on February 26, 1924, at 10:00 a. m.

That Exhibit 14, attached hereto, is a true and correct copy of a letter written and mailed to the Claim Department of the Chicago, Rock Island and Pacific Railway Company, scheduling the Review Hearing in the above entitled case to be had in the office [fol. 195] of the Iowa Industrial Commissioner on February 26, 1924, at 10:00 a. m.

That Exhibit 15, attached hereto, is a true and correct copy of

a letter written and mailed to Lehman, Seevers and Hurlburt, Attorneys, scheduling the Review Hearing in the above entitled case to be had in the office of the Iowa Industrial Commissioner on February 26, 1924, at 10:00 a. m.

That the foregoing mentioned exhibits, together form a full and complete copy of the record in the above entitled case as it now appears in the files of the Iowa Industrial Commissioner.

Signed at Des Moines, Iowa, this 23rd day of February, 1924, under the official seal of my office.

A. B. Funk, Iowa Industrial Commissioner. (Seal.)

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[fol. 196] EXHIBIT No. 1 TO DEFENDANT'S EXHIBIT "H"

BEFORE THE IOWA INDUSTRIAL COMMISSIONER OF THE STATE OF  
IOWA

[Title omitted]

### Application for Arbitration

Comes now the Chicago, Rock Island & Pacific Railway Company and makes application for the arbitration of a controversy with the respondent Fred Elder, and for grounds of this application shows the court:

The Chicago, Rock Island & Pacific Railway Company is a corporation organized under the laws of the States of Iowa and Illinois, and engaged in the business of operating a line of railroad through Iowa, Illinois and adjacent states:

The petitioner is engaged both in interstate and intrastate commerce, and is a common carrier of goods and passengers in the State of Iowa.

Fred Elder is a resident of Lucas County, State of Iowa, and has been for more than three years last past.

That a controversy relative to the payment of compensation under [fol. 197] the Iowa Workmen's Compensation Law has arisen between this applicant and the said Fred Elder which parties have been wholly unable to adjust between themselves. That said controversy arises out of the following facts and circumstances:

That on the 4th day of February, 1923, the said Fred Elder was employed by the petitioner as a brakeman upon a mine run train which was engaged in switching cars of coal from certain mines adjacent to the town of Williamson, Iowa, in Lucas County, and that the work of the said Fred Elder was not work connected with or forming a part of interstate commerce.

That while so employed and in the course of his employment, the said Fred Elder received injuries as the result of a collision be-

tween a passenger train and the train in the operation of which he was employed. That the petitioner is not fully informed or advised as to the exact extent of the injuries which have been sustained by the said Fred Elder, but alleges that the said Fred Elder was on account thereof disabled from performing the usual duties of his employment as a brakeman for a period of approximately four or five months, and that the said Fred Elder claims to be still disabled from performing his duties as a brakeman.

That the petitioner has at all times been ready, willing and able to make settlement with the said Fred Elder under the terms of the Iowa Compensation Law, and that the said respondent has refused and still refuses to accept payment thereof, and demands of the petitioner the sum of \$50,000.00.

[fol. 198] Wherefore the petitioner prays that an arbitration committee be formed, that the extent of the injury of the said Fred Elder be determined and that the extent of liability of this petitioner be determined, and that the Arbitration Committee and the Industrial Commissioner enter an order that the petitioner shall pay compensation to the said Fred Elder in accordance with the terms and provisions of the Iowa Workmen's Compensation Law.

The Chicago, Rock Island & Pacific Railway Company, by  
J. G. Gamble, R. L. Read, A. B. Howland, Its Attorneys.

STATE OF IOWA,

County of Polk, ss:

I, A. B. Howland on oath do state that I am one of the attorneys for the State of Iowa for the Chicago, Rock Island & Pacific Railway Company; that an investigation of the accident in which Fred Elder was injured has been conducted by the said railway company, and that I am familiar with the investigation, and with the facts disclosed thereby and that the facts set forth in the above and foregoing application for arbitration are true.

(Signed) A. B. Howland.

Subscribed and sworn to before me by A. B. Howland this  
4th day of January, 1924. (Signed) M. Helen Thompson,  
Notary Public in and for Polk County, Iowa.

[fol. 199] EXHIBIT No. 2 TO DEFENDANT'S EXHIBIT "H"

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

[Title omitted]

Answer

By way of answer to the application for arbitration herein, Fred Elder, employee and respondent, respectfully shows the following facts:

He denies each and every allegation of the application for arbitration except such as are herein specifically admitted.

He admits that the applicant, The Chicago, Rock Island & Pacific Railway Company is a railway corporation and common carrier, substantially as alleged in said application.

He admits that he was in the employ of said railway company on the 4th day of February, 1923 and that he received certain injuries in the course of his employment.

He alleges further that at the time of said accident the applicant was an interstate carrier and engaged in interstate commerce and that [fol. 200] he, the said respondent was employed by the applicant as its servant and employe and as such was working and engaged in interstate commerce.

That the rights of this respondent are governed and controlled by the provisions of the act of Congress generally known and designated as the Federal Employers' Liability Act.

He further specifically denies that any controversy relative to payment of compensation under the Iowa Workmen's Compensation Law has arisen and alleges that by reason of the fact that he was engaged in interstate commerce at the time of said accident, that the provisions of the Iowa Workman's Compensation Law are not applicable to said accident and this Honorable Commissioner has no jurisdiction of said accident and no jurisdiction, power or right to determine the right of this respondent on account of said accident or the injuries received therein.

He further alleges that on the 30th day of October, 1923, he commenced an action in District Court of Steele County, Minnesota, against said Railway Company to recover on account of the identical injuries sustained in the identical accident set out in the application for arbitration herein, said action being based on his rights under the Federal Employers' Liability Act.

That defendant railway company was duly served with notice and appeared and answered and in said answer denied that said railway company and this respondent were engaged in interstate commerce and specially pleaded the provisions of the Iowa Workmen's Compensation Law and acceptance thereof by both parties as fixing and [fol. 201] establishing their rights and obligations therein.

That the said District Court in and for the County of Steele and State of Minnesota is a court of plenary jurisdiction and has full jurisdiction of the parties and of the subject matter of the action and has power to hear and determine all of the issues in said cause and will hear and determine the question as to whether the provisions of the Iowa Workmen's Compensation Law are applicable in the premises, and that from the judgment entered in said cause both parties have a right to appeal to the Supreme Court of the State of Minnesota, and a further right to apply to the Supreme Court of the United States for a review of said cause, and the entire issue will be fully heard, considered and determined in said cause.

Said cause is now pending in said court and has been specially

assigned for trial for a special term of said court beginning February 24, 1924.

Wherefore your respondent prays that said application be dismissed and abated and in the alternative that all proceedings be continued until the action now pending in the District Court of Steele County, Minnesota, shall have been determined.

Davis & Michel, Lehmann, Seevers & Hurlburt, Attorneys for  
Respondent.

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[fol. 202] EXHIBIT NO. 3 TO DEFENDANT'S EXHIBIT "H"

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

[Title omitted]

Plea in Abatement

Comes now Fred Elder, employee and respondent in the above entitled proceedings and appearing by his attorneys for his plea in abatement of these proceedings, respectfully shows unto the Commissioner:

1st. That heretofore and in October 30, 1923, he commenced an action in the District Court of the County of Steele and State of Minnesota against the defendant to recover under the provisions of the Act of Congress, generally known and designated as the Federal Employers' Liability Act, to recover for the identical injuries sustained in the identical accident as those referred to in the Application for Arbitration presented in this proceedings to the commissioner, by serving the defendant within the State of Minnesota with summons and complaint as provided by the statutes of Minnesota.

[fol. 203] 2nd. That thereafter and on or about November 17, 1923, the defendant served the attorneys for the plaintiff in said cause with the answer of the defendant therein and by said service entered a general appearance under the provisions of the statutes of the State of Minnesota.

3rd. That thereafter and on or about November 19, 1923, the plaintiff in said cause served his reply to the said answer and his note of issue and caused the said cause to be docketed in said District Court for trial at the December term, 1923, of said court, and said cause was duly assigned for trial, but that by an order of the court the said cause was contained to a special term of said court to be convened and held in February, 1924, and by said order the said cause was specially assigned for trial at said special term.

4. That by its answer in said cause the defendant denies that the accident to the plaintiff was sustained while both the plaintiff and defendant were engaged in interstate commerce and specially pleads the provisions of the Iowa Workmen's Compensation Law are ap-

plicable in the premises, and that from the judgment entered in said cause both parties have a right of appeal to the Supreme Court of the State of Minnesota, and a further right to apply to the Supreme Court of the United States for a review of said cause, and the entire issue will be fully heard, considered and determined in said cause.

6th. That by reasons of the provisions of Section I of Article IV of the Constitution of the United States full faith and credit must be given to the judgment rendered in said cause by the courts of the [fol. 204] State of Iowa and said judgment will be binding and conclusive against the parties to the said action.

7th. That the application for arbitration presented by the Railway Company as employer is not presented in good faith and for the purpose of settling any disagreement between the employer and employe and growing out of a claim made by the employe under and by virtue of the provisions of the Iowa Workmen's Compensation Act, but is presented solely for the purpose of causing the employe such embarrassment as may be possible in the prosecution of the action pending between the parties in the District Court of Steele County and State of Minnesota.

8th. That said action now pending in the said District Court will be tried and determined before there could be a judicial determination thereof by any court of the State of Iowa, and that the arbitration proceedings are futile, useless and without any value to the parties and that to proceed therewith is merely to make unnecessary expense and waste of time.

9th. That if the arbitration is proceeded with and an award made and confirmed under the provisions of the Iowa Workmen's Compensation Law, the plaintiff in the action in the said District Court would be put to trouble and expense in that it might be necessary to apply to the court for equitable relief and for an injunction against the said Railway Company to prevent the filing of the confirmation and award or taking judgment in the courts of the State of Iowa.

Wherefore, the respondent prays that the proceedings abate and [fol. 205] that the application be denied, and, alternatively, in the event that the commissioner shall not sustain his said plea, then he prays that all proceedings be continued pending the determination of the cause now pending between the parties in the District Court of Steele County, Minnesota.

The respondent further prays that the commissioner will note and make of record in said proceedings, in the event that the plea in abatement be overruled and a continuance denied his protest any proceedings and his refusal to participate in the arbitration.

Davis & Michel, R. M. Haines, 419 Metropolitan Bank Bldg., Minneapolis, Minnesota; Lehmann, SeEVERS & Hurlburt, Flynn Bldg., Des Moines, Iowa, Attorneys for the Respondent.

[fol. 206] STATE OF MINNESOTA,  
County of Hennepin, ss:

I, R. M. Haines, being first duly sworn on oath state that I am an attorney at law duly admitted to practice in the State of Iowa and Minnesota, and that for six months last past I have been engaged in the practice in association with Tom Davis and Ernest A. Michel under the firm name and style of Davis & Michel, with offices at 419 Metropolitan Bank Building, Minneapolis, Minnesota; that as such an associate of said firm I personally prepared the complaint and summons in the cause of Fred Elder, plaintiff vs. Chicago, Rock Island & Pacific Railway Company, defendant, for the District Court of the County of Steele and State of Minnesota and caused the same to be served; that I have had supervisions of the said action and know personally of the facts in connection therewith and that the files and records are now in my possession; that at the request of the said Fred Elder I now make this affidavit for the reason that I have such personal knowledge of the facts; that I have prepared the foregoing plea in abatement at the request of the said Fred Elder and have full authority to appear as his attorney in this proceeding; that I know the contents of the foregoing plea in abatement and that the statements therein contained are true as I verily believe.

R. M. Haines.

Sworn to before me and subscribed in the county and state aforesaid this January 9, 1924. A. C. Hartley.  
(Seal.)

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[fol. 207] EXHIBIT NO. 4 TO DEFENDANT'S EXHIBIT "H"

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

[Title omitted]

Motion for Continuance

Comes now Fred Elder, and respectfully moves that the hearings on the plea in abatement and on the arbitration in chief be continued for a reasonable time on account of sickness of counsel, and in support thereof the Honorable Commissioner is respectfully referred to the affidavits hereto attached marked Exhibits "A", "B", and "C", respectfully.

Davis & Michel, Lehmann, SeEVERS & Hurlburt, Attorneys for  
Respondent.

[fol. 208] EXHIBIT "A" TO DEFENDANT'S EXHIBIT 4

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

[Title omitted]

STATE OF MINNESOTA,

County of Hennepin, ss:

Ernest A. Michel, being first duly sworn, deposes and says that he is a member of the firm of Davis & Michel; that R. M. Haines is an associate member of said firm.

Affiant further says that one of the members of said firm of Davis & Michel, Tom Davis, is at the present time in the City of Denver, Colorado, in attendance upon a term of the United States District Court being held in said city; that the above matter has been entirely handled and cared for by said R. M. Haines and that he alone is familiar therewith.

Affiant further says that said R. M. Haines is now confined to his home with illness and has been so confined to his home for more than one week last past.

Affiant further says that there is pending in the District Court of [fol. 209] Steele County, Minnesota, an action wherein Fred Elder is plaintiff, and Chicago, Rock Island & Pacific Railway Company is defendant; that said action is based on a law of Congress; that the term of court of said Steele County, Minnesota, and that said adjourned term convenes on the 25th day of February, 1924, and that in its order said case will be reached for trial within three or four days after said February 25th.

Affiant states that this affidavit is made for the purpose of securing a reasonable continuance of the hearing in the above entitled action so that the said R. M. Haines may be present to protest the rights of the said Fred Elder; that said Fred Elder has received serious and permanent injuries as a result of the negligence of said Chicago, Rock Island and Pacific Railway Company and that any amount that could be allowed to him by the Industrial Commission of Iowa under the Iowa statute would be wholly inadequate as compensation for his injuries.

Ernest A. Michel.

Subscribed and sworn to before me this 25th day of January,  
1924. A. C. Hartley. (Seal.)



## [fol. 210] EXHIBIT "B" TO DEFENDANT'S EXHIBIT 4

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

[Title omitted]

STATE OF MINNESOTA,

County of Hennepin, ss:

Arthur E. Allen, being first duly sworn, deposes and says that he is an osteopathic physician; that he has been practicing his profession as such for more than five years last past in the City of Minneapolis, Minnesota; that he is acquainted with R. M. Haines, an attorney at law of the firm of Davis & Michel and R. M. Haines of Minneapolis, Minnesota; that affiant is in attendance upon and caring for said R. M. Haines and that said Haines is now confined to his home in the Antlers Apartments in Minneapolis, Minnesota; with an attack of the gripe and laryngitis; that in the opinion of affiant it would not be safe for said R. M. Haines to leave his home at an earlier date than about the 6th or 7th of February; that it would be dangerous to the health of said Haines to leave his home and be in [fol. 211] Des Moines on the 28th day of January, 1924; that affiant is of the opinion that said Haines will be able to resume his duties during the week of February 4th, 1924.

Arthur E. Allen.

Subscribed and sworn to before me this 25th day of January, 1924. A. C. Hartley. (Seal.)

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EXHIBIT "C" TO DEFENDANT'S EXHIBIT 4

STATE OF IOWA,

Polk County, ss:

I, Marion B. Seevers, being first duly sworn, state that I am a member of the firm of Lehmann, Seevers & Hurlburt, attorneys located at Des Moines, Iowa; that my firm are local counsel for Fred Elder herein, and that I am the member of said firm who has had charge of this matter; that I have never seen Fred Elder, and am not familiar with either the law or the facts of this case. It has not been expected or desired by any one, either said Fred Elder, or Davis & Michel, or myself, that I take any leading part or assume any responsibility in connection with this matter.

(Signed) Marion B. Seevers.

Subscribed and sworn to before me this 26th day of January, 1924. (Signed) Mandel Elman, Notary Public. (Seal.)

[fol. 212] EXHIBIT NO. 5 TO DEFENDANT'S EXHIBIT "H"

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

[Title omitted]

### Ruling Motion for Continuance

On January 5, 1924, the Chicago, Rock Island & Pacific Railway Company employer and applicant in the above entitled cause, Filed with the Iowa Industrial Commissioner an application for Arbitration of the cause under the Iowa Workmen's Compensation Law. Fred Elder, employe and respondent, was duly notified of the filing of such application and was furnished with copy of same.

On January 11, 1924, respondent filed with the Commissioner a Plea in abatement, alleging in such plea and assigning as reason for the same that a suit involving identical injuries sustained in the identical accident was pending in the district court of the County of Steele, and State of Minnesota, and that such suit had been pending in such court since October 30, 1923.

[fol. 213] On January 22, 1924, the Iowa Industrial Commissioner duly notified the parties that the hearing on respondent's Plea in Abatement would be had in the office of the Commissioner, at Des Moines, January 28, 1924.

On January 26, 1924, respondent filed with the Iowa Industrial Commissioner Motion for Continuance of the hearing on the Plea in Abatement, assigning as reason for such Motion the illness of counsel and counsel's inability on account of illness to be present at the hearing at the time scheduled.

Such motion for continuance as filed by respondent is hereby sustained and the hearing is continued to 9:00 A. M. February 4, 1924, when it is hereby definitely scheduled to be had.

The Commissioner desires that counsel take further notice that should either party in this cause fail to be present or represented at the hearing as scheduled February 4, 1924, such failure to appear by either party shall not be considered by the Commissioner as reason for further delay in ruling upon the plea, and ruling will be issued forthwith.

Dated at Des Moines, Iowa, this 26th day of January, 1924.

A. B. Funk, Iowa Industrial Commissioner. (Seal.)

[fol. 214] EXHIBIT NO. 6 TO DEFENDANT'S EXHIBIT "H"

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

[Title omitted]

### Ruling on Plea in Abatement and Motion for Continuance

On January 11, 1924, Fred Elder, employe and respondent in the above entitled cause, filed Plea in Abatement, and alternatively Mo-

tion for a Continuance of the arbitration proceedings under the Iowa Workmen's Commission Act, petitioned for by the Chicago, Rock Island & Pacific Railway Company. Hearing on such Plea and Motion was had in the office of the department, February 4, 1924.

From the situation as outlined by counsel, the Commissioner is unable to elicit any reason for failure or refusal to assume and exercise jurisdiction of the subject matter involved. The injury in question was suffered in Iowa and proceeding under the Iowa Compensation Law is properly invoked to determine the question of liability under that statute. Wherefore, respondent's Plea in Abatement is overruled.

No acceptable reason is offered for delay in proceeding in this cause under the Iowa Workmen's Compensation Law. The petition [fol. 215] is properly before the Commissioner. The issues are defined and ready for determination in the manner prescribed by the statute. Wherefore, respondent's Motion for Continuance is denied and the arbitration hearing will be had at 10 A. M. February 11, 1924 as scheduled.

To all of which the respondent excepts.

Dated at Des Moines, Iowa, February 4, 1924.

A. B. Funk, Iowa Industrial Commissioner.

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EXHIBIT NO. 7 TO DEFENDANT'S EXHIBIT "II"

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

[Title omitted]

Stipulation

It is hereby stipulated by Fred A. Elder, by his attorneys, and the C. R. I. & P. Ry. Co., by its attorneys, that arbitration shall be had at Des Moines instead of at Chariton.

C., R. I. & P. Ry. Co., by R. L. Read, Its Attorneys. Fred Elder, by Lehmann, Seever & Hurlburt, His Attorneys.

[fol. 216] EXHIBIT No 8 TO DEFENDANT'S EXHIBIT "H"

BEFORE THE INDUSTRIAL COMMISSIONER OF THE STATE OF IOWA

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Employer and Applicant,

vs.

FRED ELDER, Employee and Respondent

Applicant's Designation of Arbitrator

Comes now the applicant, The Chicago, Rock Island & Pacific Railway Company and designates and appoints W. H. McHenry of Des Moines, as its arbitrator upon the arbitration committee.

The Chicago, Rock Island & Pacific Railway Company, by  
J. G. Gamble, R. L. Read, A. B. Howland, Its Attorneys.

[fol. 217] EXHIBIT No. 9 TO DEFENDANT'S EXHIBIT "H"

BEFORE THE INDUSTRIAL COMMISSIONER OF THE STATE OF IOWA

THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Employer and Appellant,

vs.

FRED ELDER, Employee and Respondent

Stipulation for Submission without Arbitrators

Now on this 11th day of February, 1924, it is hereby stipulated and agreed by and between the parties hereto, the employer by J. G. Gamble, R. L. Read and A. B. Howland, its attorneys, and the employe, by Davis & Michel and Lehmann, Seevers and Hurlburt, its attorneys, that the appointment of arbitrators by each party as provided in the Iowa Workmen's Compensation Law is hereby waived, and both parties do hereby consent that the Industrial Commissioner of the State of Iowa or the Deputy Industrial Commissioner shall hold said hearing and have the full power to make the same award as might have been made by an Arbitration Committee. And both parties do hereby waive the right to an arbitration [fol. 218] committee and agree that the decision of the Industrial Commissioner or his deputy shall be entered of record and have the same force and effect in all particulars as a decision of the arbitration committee, and neither party will thereafter raise any objection thereto.

Dated at Des Moines, Iowa, this 11th day of February, 1924.

The Chicago, Rock Island & Pacific Railway Company, by  
J. G. Gamble, R. L. Read, A. B. Howland, Its Attorneys.  
Fred Elder, Davis & Michel, Lehmann, Seevers & Hurlburt, His Attorneys.

[fol. 219] EXHIBIT No. 10 TO DEFENDANT'S EXHIBIT "H"

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

[Title omitted]

Stipulation

It is hereby stipulated and agreed that the cars set out in applicant's exhibits under the initials, M, W, S, K, C, S, L. & N., and I, G, N, respectively belong to railway companies operating in other states, and that said Companies have no tracks or terminals in Iowa and operate no trains and no lines of railway in Iowa. This concession is made, subject to the objection by applicant that the same is irrelevant and immaterial.

J. G. Gamble, R. L. Read, A. B. Howland, Attorneys for Applicant. Davis & Michel, Lehman, Seevers & Hurlburt, Attorneys for Respondent.

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[fol. 220] EXHIBIT No. 11 TO DEFENDANT'S EXHIBIT "H"

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

[Title omitted]

Arbitration Decision

This case was submitted at Des Moines, Iowa, February 11, 1924, to the Deputy Industrial Commissioner, arbitrators being waived by stipulation of counsel.

Upon the record it is held:

1. That in wreck occurring February 4, 1923, Fred Elder, respondent herein, sustained injuries arising out of and in the course of his employment as a freight brakeman by the Chicago, Rock Island & Pacific Railway Company, applicant in this proceeding, such injuries causing the said Fred Elder to suffer disability.

2. That at the time of the injuries in question the average weekly wage of the said Fred Elder exceeded \$25.00.

3. That at the time of the injury in question the said Fred Elder [fol. 221] was not engaged in interstate commerce so as to prohibit coverage of the case by the Iowa Workmen's Compensation Law.

4. That the case is subject to adjustment under the Iowa Workmen's Compensation Law.

Accordingly, The Chicago, Rock Island & Pacific Railway Company is hereby ordered to pay the Fred Elder under the Iowa Workmen's Compensation Law at the rate of \$15.00 per week during the period of total disability resulting from the injury in question, pay-

ments starting as of the date of the injury. The Chicago, Rock Island & Pacific Railway Company is also ordered to pay the costs of this hearing.

Dated at Des Moines, Iowa, this 13th day of February, 1921.

(Signed) Ralph Young, Deputy Iowa Industrial Commissioner. (Seal.)

---

[fol. 222] EXHIBIT NO. 12 TO DEFENDANT'S EXHIBIT "II"

BEFORE THE IOWA INDUSTRIAL COMMISSIONER

[Title omitted]

### Application for Review

Comes now Fred Elder, employe and respondent herein, and respectfully applies for a review of the arbitration decision and award herein, and prays that said arbitration decision and award be vacated and set aside; that the application for arbitration filed by the Chicago, Rock Island & Pacific Railway Company herein be dismissed, and in the alternative, that the hearing thereon be continued until the case pending in the District Court of Steele County, Minnesota, wherein Fred Elder is plaintiff and the Chicago, Rock Island & Pacific Railway Company is defendant can be tried and determined. In support of this application, this respondent respectfully assigns the following grounds therefor:

1. The Industrial Commissioner erred in overruling this respondent's [fol. 223] plea in abatement and motion for continuance.

2. The Industrial Commissioner erred in proceeding in this matter without awaiting the determination and adjudication of the case pending in the District Court of Steele County, Minnesota, wherein Fred Elder is plaintiff and the Chicago, Rock Island & Pacific Railway Company is defendant.

3. The Industrial Commissioner erred in entertaining the application for arbitration herein, because respondent at the time of his injury was engaged in interstate Commerce, and the rights and liabilities of the parties hereto was governed by the Federal Employers' Liability Act, to the exclusion of the Iowa Workmen's Compensation Act.

4. The Deputy Industrial Commissioner, sitting as a board of arbitration, erred in not recognizing the action pending in the District Court of Steele County, Minnesota, and in proceeding with the hearing before such action could be determined.

5. The Deputy Industrial Commissioner erred in overruling respondent's motion for a continuance.

6. The Deputy Industrial Commissioner, sitting as a board of arbitration, erred in holding that the respondent was not engaged

in interstate commerce at the time of his injury, as the undisputed evidence showed that the respondent was at that time engaged in interstate commerce.

7. The Deputy Industrial Commissioner, sitting as a board of [fol. 224] arbitration, erred in holding that the respondent was not engaged in interstate commerce at the time of his injury, because the greater weight and preponderance of the evidence showed that the defendant at the time of his injury was engaged in interstate commerce.

8. There is not sufficient competent evidence in the record to warrant the making of the decision and award complained of.

9. The Industrial Commissioner and the Deputy Industrial Commissioner, sitting as a board of arbitration, acted without power, and in excess of their power, because the respondent was engaged in interstate commerce at the time of his injury, and they were therefore without jurisdiction of this controversy.

10. All proceedings herein are erroneous because respondent was engaged in interstate commerce at the time of his injury.

11. All the proceedings herein are without jurisdiction because respondent was engaged in interstate commerce at the time of his injury.

Davis & Michel, Lehmann, Seever & Hurlburt, Attorneys for  
Respondent.

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[fol. 225] EXHIBIT NO. 13 TO DEFENDANT'S EXHIBIT "H"

Copy

February 20, 1924.

Davis & Michel, Attys., Metropolitan Bank Bldg., Minneapolis,  
Minnesota.

GENTLEMEN:

In re C., R. I. & P. Ry. Co. vs. Fred Elder

Please be advised that the review hearing in the above entitled case is scheduled to be had at this office, Tuesday, February 26th, at 10 A. M.

Very truly yours, Iowa Industrial Commissioner.

## EXHIBIT NO. 14 TO DEFENDANT'S EXHIBIT "H"

Copy

February 20, 1920.

Chicago, Rock Island & Pacific Railway Co., United Bank Building,  
Des Moines, Iowa.

Attention Legal Department

GENTLEMEN:

In re C., R. I. &amp; P. Ry. Co. vs. Fred Elder

Please be advised that the review hearing in the above entitled case is scheduled to be had at this office, Tuesday, February 26th, at 10 A. M.

Attorneys for Mr. Elder are being notified.

Very truly yours, Iowa Industrial Commissioner.

[fol. 226] EXHIBIT NO. 15 TO DEFENDANT'S EXHIBIT "H"

Copy

February 20, 1924.

Lehmann, Seevers & Harlburt, Attys., Flynn Building, Des Moines,  
Iowa.

Attention Mr. Seevers

DEAR SIR:

In re C., R. I. &amp; P. Ry. Co. vs. Fred Elder

Please be advised that the review hearing in the above entitled case is scheduled to be had at this office, Tuesday, February 26th, at 10 A. M.

Very truly yours, Iowa Industrial Commissioner.

## CERTIFICATE OF GOVERNOR

State of Iowa, Executive Department

To all to whom these presents shall come, Greeting:

I, N. E. Kendall, Governor of the State of Iowa and keeper of the great Seal thereof, do hereby certify that A. B. Funk is the duly appointed, qualified and acting Industrial Commissioner of the State of Iowa; that he is the custodian of the records pertaining to all causes heard and determined by the Industrial Commissioner and the Deputy Industrial Commissioner for Iowa, and is the proper [fol. 227] officer to certify to the proceedings and decisions in all



caused heard and determined by him or by the Deputy Industrial Commissioner; that the seal attached to the foregoing certificate is the official seal of the Industrial Commissioner of the State of Iowa; that the certification of the record by the said Industrial Commissioner hereto attached is in due form, as required by the laws of the State of Iowa.

In testimony whereof, I have hereunto affixed my signature and an impression of the Great Seal of the State of Iowa. Done at Des Moines, the Capital of the State, this twenty-third day of February, 1924.

N. E. Kendall, Governor. (Seal.)

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#### STIPULATION RE SETTLED CASE

It is stipulated that the foregoing transcript of testimony consisting of one hundred and twenty-six (126) typewritten pages, together with all original exhibits introduced in evidence and on file with the Clerk of this Court, to-wit: Plaintiff's Exhibits 1 to 8, inclusive, and Defendant's Exhibits "A" to "H" inclusive, may be by the Court, without notice, signed and allowed as and for the Settled Case herein.

Dated July 14, 1924.

Davis & Michel, Attorneys for Plaintiff. O'Brien, Horn, Stringer, Attorneys for Defendant.

---

[fol. 228] IN DISTRICT COURT OF STEELE COUNTY

#### ORDER SETTLING CASE—July 14, 1924

The foregoing transcript, consisting of one hundred and twenty-six (126) typewritten pages, having been by me examined and found conformable to the truth, said transcript, together with all original exhibits introduced in evidence and now on file with the Clerk of this Court, to-wit: Plaintiff's Exhibits 1 to 8, inclusive and Defendant's Exhibits "A" to "H" inclusive, may be, and the same hereby is signed, settled and allowed as and for the Settled Case herein, as containing all testimony, offers, exhibits, objections, exceptions, motions and rulings, and all other proceedings had or taken at the trial of the above entitled action.

Fred W. Senn, District Judge.

[fol. 229] IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

# VERDICT

We, the jury empaneled and sworn in the above entitled action, find for the plaintiff and assess his damages in the sum of \$29,940—Twenty-nine Thousand, Nine Hundred Forty Dollars.

Dated at Owatonna, Minn., this 3rd day of March, A. D. 1924.

Andrew Christenson, Foreman.

[fol. 230] IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

# MOTION FOR JUDGMENT OR A NEW TRIAL

To Davis & Michel, E. S. Cary, and Leach & Leach, attorneys for plaintiff, and to said plaintiff:

SIRS: Please Take Notice, that the defendant moves the Court for an order directing the entry of judgment in favor of the defendant and against the plaintiff, notwithstanding the verdict of the jury herein, and that plaintiff take nothing by this action, on the following grounds:

1. Because, upon the evidence as it stood at the time defendant's motion for a directed verdict in its favor was made, the defendant was entitled to such directed verdict.

2. Because it conclusively appeared from all of the testimony that plaintiff was at the time he sustained his injuries, not engaged [fol. 231] in interstate commerce, but was on the contrary, engaged in commerce wholly within the state of Iowa, and that the Federal Employers' Liability Act of the United States April 22nd, 1908, as amended, had and has no application to this case, and that the rights of the plaintiff and the defendant were and are governed solely by the Workmen's Compensation Act of the State of Iowa.

3. Because it conclusively appeared that the Industrial Commissioner of the State of Iowa, acting judicially and as a court under the powers granted to it by the Workmen's Compensation Act of the State of Iowa, had adjudged and decreed that plaintiff was not at the time of his injuries, engaged in interstate commerce, but that he was on the contrary engaged in commerce wholly within the state of Iowa, and that said Industrial Commissioner had awarded compensation to plaintiff for his said injuries under the Workmen's Compensation Act of the State of Iowa, and that said judgment of said Industrial Commissioner was, and is res judicata, and was and

is conclusive and binding upon this court under Section 1, of Article IV., of the Constitution of the United States.

You will further take notice, that if the Court should not grant, but on the contrary should deny said defendant's motion for judgment notwithstanding the verdict, then and in that event the defendant moves the court for an order vacating and setting aside the verdict of the jury herein, and for a new trial of this action, on the following grounds:

1. Because said verdict is not justified by the evidence.

[fol. 232] 2. Because said verdict is contrary to law.

3. Because of errors of law occurring at the trial and duly excepted to by the defendant at the time.

4. Because of excessive damages appearing to have been given by the jury under the influence of passion and prejudice.

5. Because of the following errors of law occurring at the trial, and herein specifically assigned, to-wit:

a. The court erred in refusing to direct a verdict in favor of the defendant and against the plaintiff.

b. The court erred in refusing to hold as a matter of law that plaintiff was not engaged in interstate commerce at the time of his injury, and in refusing to hold that plaintiff was, at the time of his injury, engaged wholly in commerce within the state of Iowa.

c. The court erred in submitting to the jury the question of whether plaintiff was engaged in interstate commerce at the time of his injury.

d. The court erred in sustaining plaintiff's objection to the introduction of defendant's Exhibit "G," and in excluding said exhibit from the evidence, said exhibit being an exemplified copy of the Workmen's Compensation Act of the State of Iowa, for the reason that it conclusively appeared that said Workmen's Compensation Act of the State of Iowa governed exclusively the rights of the parties of this action.

e. The court erred in sustaining plaintiff's objection to the introduction of defendant's Exhibit "H," and in excluding said exhibit [fol. 233] from the evidence, said exhibit being an exemplified copy of the judgment of the Industrial Commissioner of the State of Iowa, whereby it was adjudged and decreed that plaintiff was not at the time of his injury, engaged in interstate commerce, but was on the contrary engaged wholly in commerce within the state of Iowa only, for the reason that said judgment was, and is *res judicata* and binding upon this court under Section 1, Article IV., of the Constitution of the United States, and its exclusion from the evidence deprived this defendant of its rights under the United States Constitution.

Said motion is made upon all the records and files in this cause, and upon a case to be settled and allowed by the Court.

O'Brien, Horn & Stringer, Attorneys for Defendant, 1116 Pioneer Building, St. Paul, Minn.

Due and personal service of the within notice of motion is hereby admitted, this 30th day of April, 1924.

The hearing of said motion will be had at the time and place convenient and satisfactory to the Court and counsel, and to be agreed upon. Until the hearing of said motion, it is agreed that all proceedings herein be stayed.

Davis & Michel, Attorneys for Plaintiff.

[fol. 234] IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

#### ORDER DENYING MOTION FOR JUDGMENT OR A NEW TRIAL

The above entitled matter came on for hearing before the court at Mantorville, Minnesota, on the 14th day of July, 1924, upon the motion of the defendant for an order setting aside the verdict of the jury herein and granting to the defendant judgment as against the plaintiff, or, in the alternative, for an order setting aside the verdict of the jury herein and granting to the defendant a new trial of said cause. O'Brien, Horn & Stringer, Esqs., St. Paul, Minn., appeared for the defendant in support of said motions, and Davis & Michel, E. S. Cary and Leach & Leach, Esqs., appeared for the plaintiff. The matter was submitted upon a settled case herein, upon all the records and files in said cause and upon the oral arguments and briefs of counsel. After due consideration,

It is ordered that said motions be and the same are in all things denied.

Fred W. Senn, District Judge.

[fol. 235] IN DISTRICT COURT OF STEELE COUNTY

#### MEMORANDUM

This action is brought under the Federal Employers' Liability Act. The plaintiff was a brakeman working with a switching crew on defendant's railway, engaged in hauling cars in and out of the coal mines near Pershing siding, Iowa. It was the duty of this crew to place loaded cars for shipment upon the tracks at Pershing siding in such order that each east bound or west bound trains might pick them up and carry them to their destination. At noon on the day of the accident, the switching crew was given permission to proceed

to Chariton, Iowa, for dinner and for water over the main line of the defendant railroad. After going onto the main line at Pershing siding the work train was struck by a thru passenger train from Minneapolis to Kansas City going in the same direction. The caboose of the work train was demolished and plaintiff was seriously injured.

The defendant upon the trial of the case admitted that its negligence was the direct and proximate cause of the plaintiff's injury. The work train was given the use of the main line to proceed to Chariton at a time when a thru passenger train had the right of way.

The Court submitted to the jury the question as to whether plaintiff and defendant at the time of the collision were engaged in interstate commerce, and if they were so engaged then the question of the amount of damages that plaintiff is entitled to recover.

It appears that jury prior to the collision plaintiff was engaged in [fol. 236] moving loaded cars for interstate shipment. The jury found that plaintiff and defendant were as a matter of fact engaged in interstate commerce and returned a verdict for the plaintiff.

The instant case was started on October 30, 1923. Thereafter and on January 5, 1924, the defendant company instituted proceedings before the Industrial Commission of the State of Iowa, which determined the character of plaintiff's employment and made an award of \$15,000 per week during the period of his total disability to be paid to him by the defendant.

The defendant now claims that the plaintiff, Elder, is barred from making any recovery because an award has been made in his favor by the Industrial Commission of the State of Iowa; that the Iowa tribunal's determination that plaintiff was engaged in interstate commerce is binding upon this Court and that the order of the Industrial Commission is *res judicata*.

This contention of the defendant cannot be sustained. The Court takes the view that the Federal law supersedes all state laws, rules or regulations governing the same subject.

Cases cited by counsel for plaintiff are in point.

Seaboard Air Line Co. v. Horton, 233 U. S. 492.

Employers' Liability Cases, 223 U. S. 1.

Erie Ry. Co. v. Winfield, 244 U. S. 170.

New York Ry. Co. v. Winfield, 244 U. S. 147.

I think the claims of estoppel and *res judicata* as made by the defendant are disposed of by the cases of

Troxell v. D. L. & W. R. Co., 227 U. S. 434.

St. L. I. M. & S. R. Co. v. Hesterly, 228 U. S. 700.

[fol. 237] Philadelphia & R. R. Co. v. Hancock, 253 U. S. 284.

The proceedings before the Industrial Commission in Iowa were instituted by the defendant. The plaintiff objected to those proceedings. The plaintiff, and not the defendant, had the election how the suit should be brought. To permit the defendant to institute proceedings in its own way in a State tribunal under a State law and to do so even after plaintiff has instituted his action

would defeat the object and the purpose of the Federal Act. Evidently the defendant took steps to accomplish that result.

The plaintiff and defendant were engaged in interstate commerce under the claim of plaintiff and was entitled to have such question submitted to the court and jury and the Industrial Commission was without authority to make an order which is conclusive upon this court and which will defeat a right given to the plaintiff by Congress.

Upon the question of liability there is no defense. The injury sustained by the plaintiff was serious and is permanent. Damages do not appear excessive and counsel for the defendant does not strongly urge the return of excessive damages by the jury's verdict.

The exhibits of the defendant were properly rejected by the court and the verdict will stand.

Senn.

[fol. 238] IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

JUDGMENT—September 18, 1925 — P

This cause having been regularly placed upon the Calendar of the above named Court for the December A. D. 1923, Regular Term thereof, came on for trial before the Court and a Jury duly empanelled and sworn to try the same on the First day of March A. D. 1924, which said Jury did on the Third day of March A. D. 1924, duly render a verdict herein which, in substances, follows:

"We, the jury empanelled and sworn in the above entitled action, find for the plaintiff and assess his damages in the sum of \$29,940—Twenty-nine Thousand, Nine Hundred Forty Dollars.

Dated at Owatonna, Minn., this 3rd day of March A. D. 1924.

Andrew Christenson, Foreman."

Now, pursuant to said verdict and on motion of Ernest A. Michel, one of the Attorneys for Plaintiff it is hereby adjudged that the Plaintiff recover of the Defendant and each of them the sum of [fol. 239] (\$30,913.05) Thirty Thousand, Nine Hundred and 05-100 Dollars, the amount of said Verdict and interest to date hereof, together with (\$116.25) One Hundred Sixteen and 25-100 Dollars cost and disbursements, as taxed and allowed, amounting in all to the sum of (\$31,029.30) Thirty-one Thousand, Twenty-nine and 30-100 Dollars.

By the Court.

Bernard McGovern. Clerk District Court. (Court Seal.)

## IN DISTRICT COURT OF STEELE COUNTY

[Title omitted]

## NOTICE OF APPEAL

To Messrs. Davis & Michel, attorneys for plaintiff, and to Bernard McGovern, Esq., clerk of the District Court of Steele County, Minnesota.

SIRS: Please take notice, that the above named defendant appeals to the Supreme Court of the State of Minnesota, from the judgment [fol. 240] entered in the above entitled action, entered and docketed on September 18, 1924, by which it was adjudged and decreed that plaintiff recover of the defendant the sum of Thirty-one Thousand, Twenty-nine and 30-100ths (\$31,029.30) Dollars. Said appeal is from the whole of said judgment, and from each and every part thereof.

Respectfully, O'Brien, Horn & Stringer, Attorneys for Defendant, 1116 Pioneer Building, St. Paul, Minnesota.

Due and personal service of the above Notice of Appeal is hereby admitted, this 22nd day of September, 1924.

Davis & Michel, Attorneys for Plaintiff.

Due and personal service of the above Notice of Appeal is hereby admitted, this 26 day of September, 1924.

Bernard McGovern, Clerk District Court, Steele County, Minnesota.

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[fols. 241-244] BOND ON APPEAL FOR \$35,000—Approved; omitted in printing

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[fol. 245] IN SUPREME COURT OF MINNESOTA

FRED A. ELDER, Respondent,

vs.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant

ASSIGNMENTS OF ERROR

The court erred:

1. In refusing to direct a verdict in favor of defendant and against plaintiff.

2. In refusing to hold, as a matter of law, that plaintiff was not at the time of his injury engaged in Interstate commerce and in re-

fusing to hold that he was on the contrary engaged in commerce wholly within the state of Iowa, and in holding this to be a question of fact for the jury.

3. In refusing to hold that the judgment of Industrial Commissioner of Iowa, by which it was adjudged that plaintiff was not engaged in interstate commerce was *res judicata* and binding and conclusive upon the court and the plaintiff herein, thereby refusing to give full faith and credit to the judgment of the Iowa tribunal contrary to Section 1 of Article 4 of the Constitution of the United States, and denying to the defendant its constitutional rights thereunder.

4. In denying the defendant's motion for judgment in its favor notwithstanding the verdict of the jury against it.

5. In denying defendant's motion to set aside the verdict and for a new trial of this action.

A. Because said verdict was not justified by the evidence.

B. Because said verdict was contrary to law.

C. Because of errors of law occurring at the trial and duly excepted to by the defendant at the time.

D. Because of excessive damages appearing to have been given by the jury under the influence of passion and prejudice.

E. Because of the following errors of law occurring at the trial and herein specifically assigned, to-wit:

(a) The court erred in refusing to direct a verdict in favor of the defendant, and against the plaintiff.

(b) The court erred in refusing to hold as a matter of law, that [fol. 247] plaintiff was not engaged in interstate commerce at the time of his injury, and in refusing to hold that plaintiff was, at the time of his injury, engaged wholly in commerce within the state of Iowa.

(c) The court erred in submitting to the jury the question of whether plaintiff was engaged in interstate commerce at the time of his injuries.

(d) The court erred in sustaining plaintiff's objection to the introduction of defendant's Exhibit "G", and in excluding said exhibit from the evidence, said exhibit being an exemplified copy of the Workmen's Compensation Act of the State of Iowa; for the reason that it conclusively appeared that said Workmen's Compensation Act of the State of Iowa governed exclusively the rights of the parties to this action.

(e) The court erred in sustaining plaintiff's objection to the introduction of defendant's Exhibit "H", and in excluding said exhibit from the evidence, said Exhibit being an exemplified copy of the judgment of the Industrial Commissioner of Iowa, whereby it



was adjudged and decreed that plaintiff was not at the time of his injury, engaged in interstate commerce, but was on the contrary engaged wholly in commerce within the state of Iowa only, for the reason that said judgment was and is res judicata and binding upon this court under Section 1, of Article IV, of the Constitution of the United States, and its exclusion from the evidence deprived this defendant of its rights under said United States Constitution.

[fol. 248] 6. In entering judgment in favor of plaintiff and against defendant, thereby violating Section 1, of Article IV, of the Constitution of the United States, and depriving this defendant of its constitutional rights under said section and article of the constitution.

[fol. 249]

[File endorsement omitted]

# IN SUPREME COURT OF MINNESOTA

[Title omitted]

OPINION—Filed June 19, 1925

## Syllabus

1. The evidence sustains a finding of the jury that the plaintiff was employed in interstate commerce at the time of his injury.
2. The plaintiff's cause of action was not barred by an award in a compensation proceeding instituted by the defendant in the state where the accident occurred.
3. The verdict is not excessive.

Judgment affirmed.

## Opinion

Action under the Federal Employers' Liability Act to recover for [fol. 250] personal injuries. There was a verdict for the plaintiff. The defendant's motion for judgment notwithstanding the verdict or for a new trial was denied. Judgment was entered on the verdict. The defendant appeals from the judgment.

1. The plaintiff was injured in the accident considered in Schendel, administrator, against the same defendant, — Minn. —, — N. W. —. He was the brakeman who set the brakes on the interstate cars, in the sidetrack at Pershing. That was the last work done on the cars brought from the mine on the day of the accident. The facts relative to the day's work are sufficiently stated in the Schendel case. The facts characterizing the intestate there, and the plaintiffs here, as employed in interstate commerce are different; but here as there the question was at least for the jury.

2. The action was brought on October 30, 1923. On January 5, 1924, the defendant instituted proceedings under the compensation act of Iowa against the plaintiff to have determined his compensation. The plaintiff here, defendant in that proceeding, filed a plea in which he alleged the pendency of the action commenced in Minnesota and claimed a right under the Federal Employers' Liability Act. On February 4, 1924, the plea was overruled. The deputy industrial commissioner on February 13, 1924, made an award to the plaintiff here of \$15 per week during the period of total disability which was left undetermined, and this award was pleaded as a bar by supplemental answer. The action came on for hearing on March 1, 1924, [fol. 251] and the verdict was returned on March 3, 1924. If the conclusion reached in the Schendel case is correct the award is not a bar. The compensation proceeding went no farther than a finding by the deputy commissioner, which was the equivalent of a finding by the arbitration committee. In view of the Schendel case we engage in no further discussion.

3. The defendant insists that the verdict, which was for \$29,940, is excessive. Plaintiff was 38 years old. He earned from \$240 to \$250 per month. He was badly burned, some ribs were broken, he suffered a concussion of the brain, and was unconscious for a few days. There was an injury to the spinal cord. There is testimony that he will never be able to do manual work again—at least heavy work. He is deformed and still suffers.

The verdict is not excessive. Injuries are usually not quite alike nor are other elements entering into a proper award of damages, such as age, life expectancy, earning capacity, pain and suffering, from the combination of which the award must be estimated in a sensible way, just the same. Damages awarded and sustained in other cases are of value for illustration, but usually not at all controlling. *Whitehead v. Wisconsin, &c. R. Co.*, 103 Minn. 13; *Clay v. Chicago &c. R. Co.*, 104 Minn. 1; *Sprague v. Wisconsin Cent. R. Co.*, 104 Minn. 58; *McMahon v. Illinois Cent. R. Co.*, 127 Minn. 1.

Judgment affirmed.

Mr. Justice Stone took no part.

[fol. 252]

IN SUPREME COURT OF MINNESOTA

[Title omitted]

PETITION FOR STAY

The above named appellant, feeling itself aggrieved by the order for judgment of this Court herein, by which this Court did order judgment affirming in all things the judgment of the Court below, and desiring to petition the Supreme Court of the United States for a writ of certiorari to review the final judgment of this Court, when entered, does hereby pray that the Court do enter its order staying

all proceedings herein and during the pendency of such petition for a writ of certiorari to said United States Supreme Court.

The Chicago, Rock Island & Pacific Railway Company, by  
O'Brien, Horn & Stringer, Its Attorneys.

[fol. 253]

IN SUPREME COURT OF MINNESOTA

ORDER OF STAY—June 22, 1925

Upon application of the above named appellant:

It is ordered, that upon and after the entry of final judgment herein affirming the judgment of the Court below, all proceedings herein in this Court and in the District Court of Steele County, Minnesota, including the issuance of any writ of execution out of either Court and the issuance of any remittitur from this Court to the Court below, be and hereby are in all things stayed pending the petition of the appellant for a writ of certiorari to the United States Supreme Court.

Homer B. Dibbell, Justice.

[fol. 254]

IN SUPREME COURT OF MINNESOTA

[Title omitted]

JUDGMENT—Filed June 30, 1925

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Steele, be and the same hereby is in all things affirmed.

And it is further determined and adjudged that Respondent herein, do have and recover of Appellant herein the sum and amount of Sixty-four Dollars (\$64.00), costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed June 30th, A. D. 1925.

By the Court.

Attest.

Grace F. Kaercher, Clerk.

[fol. 255]

Statement for Judgment

Statutory costs, \$25.00; Printer, \$39.00; Total, \$64.00.

[File endorsement omitted.]

[fol. 256]

## IN SUPREME COURT OF MINNESOTA

[Title omitted]

## CLERK'S CERTIFICATE

I, Grace F. Kaercher, Clerk of the Supreme Court of the State of Minnesota do hereby certify that the foregoing consisting of 255 numbered pages, is a true and complete transcript of the record on appeal to this court, comprising the record on appeal from the District Court of the Fifth Judicial District in and for Steele County, Minnesota, to this court, together with all proceedings in said cause in this court, including the opinion of the court thereon and the final judgment of this court on said appeal.

In Witness Whereof I have hereunto set my hand and affixed the seal of this court, this 27 day of July, 1925.

Grace F. Kaercher, Clerk of the Supreme Court of the State of Minnesota. (Seal of the Supreme Court, State of Minnesota.)

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[fol. 257] IN SUPREME COURT OF THE UNITED STATES

## ORDER ALLOWING CERTIORARI—Filed October 19, 1925

The petition herein for a writ of certiorari to the Supreme Court of the State of Minnesota is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(8354)

**No. 683**

AUG 17 1922

WM. R. STANSBURY  
CLERK

IN THE  
**UNITED STATES SUPREME COURT**

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COM-  
PANY,

*Petitioner,*

VS.

A. D. SCHENDEL, as Special Administrator of the  
Estate of CLARENCE Y. HOPE, Deceased,

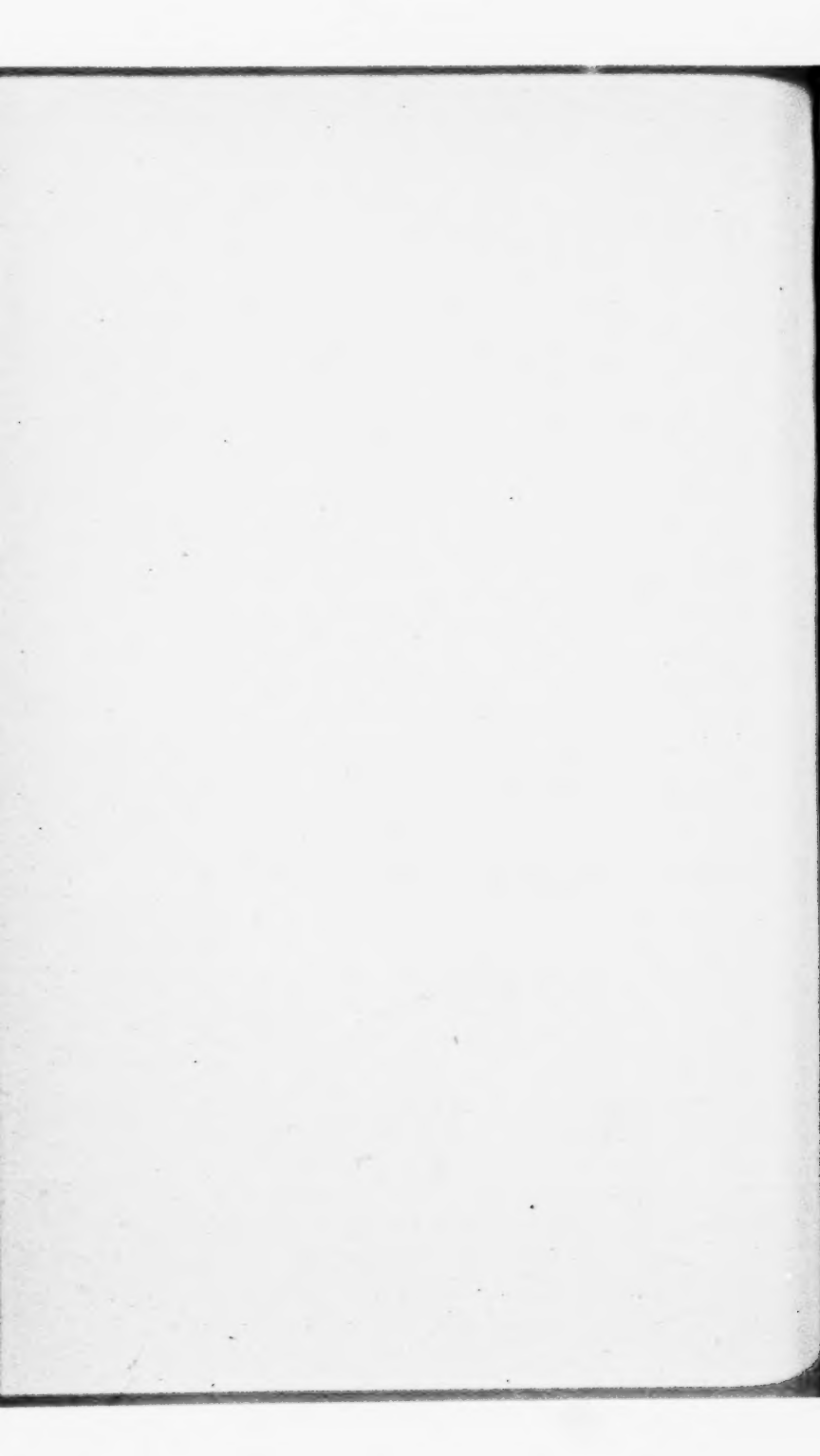
*Respondent.*

PETITION FOR WRIT OF CERTIORARI TO  
THE SUPREME COURT OF MINNESOTA.

M. L. BELL,  
New York, New York,

W. F. DICKINSON,  
DANIEL TAYLOR,  
Chicago, Illinois,

THOMAS D. O'BRIEN,  
EDWARD S. STRINGER,  
St. Paul, Minnesota,  
Counsel for Petitioner.



IN THE  
**UNITED STATES SUPREME COURT**

---

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,

*Petitioner,*

vs.

A. D. SCHENDEL, as Special Administrator of the  
Estate of CLARENCE Y. HOPE, Deceased,

*Respondent.*

---

PETITION FOR WRIT OF CERTIORARI TO  
THE SUPREME COURT OF MINNESOTA.

---

*To the Honorable the Chief Justice and Associate  
Justices of the Supreme Court of the United  
States:*

Your Petitioner, CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, a corporation organized under the laws of the states of Illinois and Iowa, respectfully presents to this court its petition for a writ of certiorari, addressed to the Supreme Court of the State of Minnesota, commanding said

court and the clerk thereof to certify to this court the record and proceedings of the case in said court, wherein your petitioner was appellant and defendant, and A. D. Schendel, as Special Administrator of the Estate of Clarence Y. Hope, Deceased, was plaintiff and respondent, for a review and determination of said cause by this court.

On June 30, 1925, the said Supreme Court of Minnesota did enter its judgment, whereby it did affirm a judgment of the District Court of Steele County, Minnesota, in favor of plaintiff-respondent, A. D. Schendel, as Special Administrator of the Estate of Clarence Y. Hope, Deceased, and against the defendant, your petitioner, for the sum of \$26,931.72. Said judgment was and is the final judgment of said Supreme Court of Minnesota in said cause, and said Supreme Court of the State of Minnesota was and is the highest court of law and equity in which a decision could be had in said cause. In said cause your petitioner especially set up and claimed a right, under the Constitution of the United States, to-wit: Under Section 1, of Article IV thereof, and the decision of the Supreme Court of the State of Minnesota was against the right so especially set up and claimed by your petitioner.

This action was brought by the plaintiff for damages under the Federal Employers' Liability Act of April 22, 1908. Hope's widow, Jessie Hope, was his sole and only dependent. The sole question at issue in the case was whether Hope, at the time of his death, was engaged in interstate com-



merce, and hence, under the Federal Employers' Liability Act, or engaged only in intrastate commerce, and hence, under the Compensation Act of the State of Iowa where said accident occurred. Concededly if engaged in intrastate commerce, there could be no recovery in this action.

After the commencement of this action but prior to its trial, your petitioner, claiming that any cause of action existing for the death of decedent was governed by the Compensation Act of the State of Iowa, filed its petition with the Industrial Commissioner of Iowa, asking for an adjudication of the matter under that act. Jessie Hope, the widow of said decedent and his only dependent under the Federal Employers' Liability Act, if a cause of action existed under that act, duly appeared in said proceeding, asserting that the decedent was at the time of his death, engaged in interstate commerce. A decision was duly rendered by the Arbitration Committee, holding specifically that said decedent was engaged in intrastate commerce only. Said Jessie Hope filed an application for review by the Industrial Commissioner, who affirmed the decision of the Arbitration Committee, from which decision said Jessie Hope appealed to the District Court of Lucas County, Iowa, which court (the same being a court of record of the state of Iowa), on June 2, 1923, entered its final judgment, which remains unreversed, specifically adjudging that the decedent was engaged in intrastate commerce at the time of his death.

Thereafter, and on March 4, 1924, this action (under the Federal Employers' Liability Act) was tried. Your petitioner offered in evidence an exemplified copy of the judgment of the District Court of Lucas County, Iowa, by which it was adjudged that the decedent was engaged in intrastate commerce, only.

The District Court of Steele County refused to receive said judgment of the Iowa court in evidence, and refused to direct a verdict in favor of the defendant, your petitioner, made upon the ground that it was conclusively established by said Iowa judgment that decedent was engaged in intrastate commerce. Said court submitted the character of the commerce to the jury, who found as a fact that it was interstate. The court denied a motion for judgment notwithstanding the verdict or for a new trial, made upon the same grounds. Judgment was entered in favor of plaintiff, and upon appeal, the final judgment of the Supreme Court of Minnesota affirmed the lower court. The opinion is reported in *Schendel vs. Chicago, R. I. & P. Ry. Co.*, 204 N. W. 552. (R. 210-228.)

THE DISTRICT COURT OF LUCAS COUNTY, IOWA,  
ENTERED A JUDGMENT DECREERING THAT DECEDENT  
WAS ENGAGED IN INTRASTATE COMMERCE.

THE DISTRICT COURT OF STEELE COUNTY, MINNESOTA, REFUSED TO BE BOUND BY THE IOWA JUDGMENT AND HELD DIRECTLY THE CONTRARY, AND THE SUPREME COURT OF MINNESOTA SUSTAINED IT IN SO DOING.

THE SUPREME COURT OF MINNESOTA ERRED IN AFFIRMING THE DISTRICT COURT OF STEELE COUNTY, MINNESOTA, IN REFUSING TO GIVE FULL FAITH AND CREDIT TO A JUDGMENT OF A COURT OF RECORD, OF THE STATE OF IOWA, CONTRARY TO SECTION 1, OF ARTICLE IV, OF THE CONSTITUTION OF THE UNITED STATES.

The reasons for the decision of the Supreme Court of Minnesota were, in brief, as follows:

1. That the judgment of the District Court of Lucas County, Iowa, was not binding because:

"Without authority controlling or certainly guiding us, we are content to hold that the substantive right given the employe or his representative by Congress under express constitutional grant, with the courts to which he may go for its enforcement pointed out to him, is a superior substantive right; and that when he or his representative has chosen the forum to which to submit his cause, he can not, against his objection and upon the initiative of his employer, be required to submit it in a summary proceeding commenced later under a compensation act." (R. 224.)

2. That there was no identity of parties in the two actions, the party to the Iowa judgment being the widow (although the sole beneficiary in any event under the Federal act), and the party to the Minnesota action being the administrator (although merely the trustee for such sole beneficiary for the purpose of suit).

Both questions decided by the Supreme Court of the State of Minnesota were Federal questions

of substance, neither of which has heretofore been specifically determined by this court, and the Supreme Court of the State of Minnesota decided such Federal questions in a way not in accord with such decisions of this court as bear upon the questions.

The first question decided by the Supreme Court of the state of Minnesota has been decided by two other courts only, and both contrary to the decision of the Minnesota Supreme Court. See the California decision, *Williams v. Southern Pacific Ry. Co.* 202 Pac. 356, 54 Cal. App. 571, and the decision of the Circuit Court of Appeals of the Second Circuit, *Dennison v. Payne*, 293 Fed. 333. The opinion in the *Williams* case was written by the District Court of Appeals of California, but the Supreme Court of the State of California, on December 15, 1921, adopted it by refusing a hearing, and this court denied a writ of certiorari to the Supreme Court of California, but upon the ground that there was no final judgment. See 258 U. S. 622.

Upon the second proposition (identity of parties), there is a direct conflict between the *Williams* case and the *Dennison* case, the *Williams* case holding that there is such identity of parties, and the *Dennison* case holding the contrary.

Your petitioner is advised that said final judgment of the Supreme Court of the State of Minnesota is erroneous, and this Honorable Court should require the case to be certified to it for its review and determination for the reasons herein-

before stated and for the reasons stated in the accompanying brief.

Your petitioner presents herewith a certified copy of the entire record in said cause, including the proceedings in the Supreme Court of the State of Minnesota, and the opinion of said court.

WHEREFORE, Your petitioner respectfully prays that a writ of certiorari be issued under the seal of this court, directed to the Supreme Court of the State of Minnesota, sitting at St. Paul, Minnesota, commanding the court to certify and send to this court on a day to be designated, a full and complete transcript of the record and all proceedings of the Supreme Court of the State of Minnesota had in said cause, to the end that said cause may be reviewed and determined by this Honorable Court, as provided by law, and that the said judgment of the Supreme Court of the State of Minnesota be reviewed by this Honorable Court, and for such further relief as may seem proper, and your petitioner will forever pray.

M. L. BELL,  
New York, New York,

W. F. DICKINSON,  
DANIEL TAYLOR,  
Chicago, Illinois,

THOMAS D. O'BRIEN,  
EDWARD S. STRINGER,  
St. Paul, Minnesota,  
Counsel for Petitioner.

## STATE OF MINNESOTA,

County of Ramsey, ss.

EDWARD S. STRINGER, being duly sworn, deposes and says that he is one of the counsel for petitioner, Chicago, Rock Island & Pacific Railway Company. That he has read the foregoing annexed petition and knows the contents thereof. That he has carefully read and studied the duly certified copy of the transcript of the record which accompanies the petition herein, being a transcript of the record in the case at bar. That the matters in said petition are, in the judgment of this affiant, duly supported in and by said transcript of record, and he knows of the above proceedings had and that the matters in said petition herein stated are true to the best of his knowledge and belief.

EDWARD S. STRINGER.

Subscribed and sworn to before me this 15th day of August, A. D. 1925.

M. A. HAYES,

Notary Public,

Ramsey County, Minnesota.

My commission expires November 26, 1927.

(Notarial Seal)

I do hereby certify that I have carefully examined the foregoing petition for a writ of certiorari, and the allegations thereof are true, as I verily believe, and, in my opinion, the petition is well founded and the case is one in which the prayer of the petition should be granted by this Court.

EDWARD S. STRINGER,

Counsel for Petitioner.

MAR 8 1926

WM. R. STANBURY  
CLERK

(31,406)

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IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925.

No. 683.

---

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COM-  
PANY,

*Petitioner,*

vs.

A. D. SCHENDEL, as Special Administrator of the  
Estate of CLARENCE Y. HOPE, Deceased,

*Respondent.*

---

PETITIONER'S REPLY BRIEF.

---

M. L. BELL,

New York, New York,

W. F. DICKINSON,

DANIEL TAYLOR,

Chicago, Illinois,

THOMAS D. O'BRIEN,

ALEXANDER E. HORN,

EDWARD S. STRINGER,

St. Paul, Minnesota,

Counsel for Petitioner.

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IN THE  
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*Respondent.*

---

PETITIONER'S REPLY BRIEF.

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B.

JURISDICTION OF IOWA INDUSTRIAL COMMISSIONER  
AND IOWA COURT ON APPEAL.

Many pages are devoted by respondent to the proposition that the Federal Employers' Liability Act is supreme as to interstate commerce, and that

a state cannot now legislate with respect to it. After the many decisions of this court, such elaborate citation of authorities on this proposition should be unnecessary. However, such rule is wholly foreign to this discussion, as it is quite a different proposition from holding that a state can establish a tribunal with jurisdiction to determine whether commerce is interstate, or intrastate. For such tribunal so to determine a fact, is not interfering in any way with interstate commerce. It is merely determining whether or not interstate commerce exists. Of course if such tribunal reaches a wrong conclusion, it is subject to review by direct appellate procedure, as interstate commerce is a federal question, but even in the event a state tribunal should decide, as many courts did decide before this court spoke, that the rights of employees in interstate commerce could be limited by state legislation, that decision of the state tribunal, although in fact erroneous, would be final and conclusive if not set aside by direct review.

Respondent's brief, page 55, contains this statement with respect to the jurisdiction of the Iowa Industrial Commissioner:

"From the moment the Federal right was asserted, *the Commission was without power, right or authority to continue with the case.*"

Let us see where such proposition would lead us as a practical matter if followed to its logical conclusion.

Suppose a railway employee is hurt in Iowa under circumstances involving no negligence on the

part of his employer. He claims that he was engaged in intrastate commerce, and entitled to an award under the state Compensation Act. His employer, however, asserts that he was employed in interstate commerce, and hence under the Federal Employers' Liability Act, and since there was no negligence, is entitled to nothing. Obviously there must be some tribunal with jurisdiction to determine the issue. The injured man files his petition with the Industrial Commissioner alleging intrastate commerce. The railway company answers with the allegation that the commerce was interstate.

With the pleadings in this condition, what is the injured man's remedy? Respondent's proposition is:

"From the moment the Federal right was asserted, *the Commission was without power, right or authority to continue with the case.*"

If this proposition is sound, the Industrial Commissioner must on the mere allegation of interstate commerce, cease to function and cannot determine the only issue tendered. The only other possible remedy for the injured man is an action under the Federal Employers' Liability Act, and he must, if respondent's contention is correct, begin an action under that act, and assert (what he in fact claims is not true) that he was injured in interstate commerce, and since he cannot truthfully allege negligence, he must fail on the face of his pleading. In other words, under respondent's

theory, the man is deprived of any hearing whatever.

But assume that the Industrial Commissioner violates what respondent claims is the law, proceeds to determine the issue of the character of the commerce, decides that it is intrastate, and makes his award accordingly. The railway company can of course appeal, but under respondent's theory it is a wholly useless proceeding, because he claims since interstate commerce was asserted, that ends the Commissioner's jurisdiction, and not only is his award void, but any judgment affirming it, on appeal is void and can be wholly ignored.

The necessary result of respondent's line of reasoning is that a man asserting a cause of action under the Iowa Workmen's Compensation Act is deprived of any remedy and any hearing because of a mere assertion of a Federal right as defense by his opponent. It should be unnecessary to argue that this is not the law.

Counsel quotes the remark of Mr. Justice Butler, in *Kansas City Structural Steel Co. v. Arkansas*, 46 Sup. Ct. Rep. 59, — U. S. —, decided November 16, 1925:

"But this court will determine for itself whether what was done by plaintiff in error was interstate commerce."

The correctness of this proposition is of course not open to question, but what it has to do with this case is not apparent. Interstate commerce is a Federal question, and a state decision on what constitutes interstate commerce is not binding upon this court, *when the question comes before this*



court for direct review. The case cited came up on a writ of error from the Supreme Court of Arkansas. The court of course never intended to overturn the well established doctrine of res judicata or by the remark "will determine for itself" to hold that it would ignore collaterally a judgment of a state court which was not before it by direct appeal.

The very cases cited by respondent, *New York Central Railroad Company v. Winfield*, 244 U. S. 147, and *Erie Railroad Company v. Winfield*, 244 U. S. 170, show clearly that respondent's contention is incorrect. In both cases the Compensation Commission awarded compensation as against an assertion that the man was engaged in interstate commerce. While these awards were set aside by this Court, it was in each case upon direct review by writ of error, and because the assertion of interstate commerce was true and not by ignoring the state judgments collaterally, and not because of the mere assertion of interstate commerce.

### C.

#### IDENTITY OF PARTIES.

Counsel relies on the four cases of

*Brown v. Fletcher*, 210 U. S. 82;

*Ingersoll v. Coram*, 211 U. S. 335;

*Troxell v. Delaware, L. & W. R. Co.*, 227 U. S. 434, and

*Dennison v. Payne*, 293 Fed. 333.

The first three are clearly not in point.

*Brown v. Fletcher*, Held that an executor appointed in one state was not in privity with an administrator appointed in another. The reason for the holding is outlined in the decision of the Supreme Court of Massachusetts in *Low v. Bartlett*, 8 Allen, 259, as follows:

"If we look at the question of privity between the executor here and the ancillary administrator in Vermont, it is difficult to find any valid ground on which such privity can rest. *The executor derives his authority from the letters testamentary issued by the probate court here; he gives bond to that court; is accountable to it for all his proceedings; makes his final settlement in it and is discharged by it, in conformity with the statutes of this commonwealth. The administrator derives his authority from the probate court in Vermont, and is accountable to it in the same manner in which the executor is accountable to our court. The authority of the executor does not extend to the property there, nor to the doings of the administrator. Nor does the authority of the administrator extend to the property here, or to the doings of the executor.*"

The Massachusetts case is quoted and cited with approval in *Brown v. Fletcher*.

In other words a judgment against a trustee of one trust is not *res judicata* against another trustee of a wholly different and distinct trust, even though the ultimate beneficiaries of both trusts are the same. There is clearly no privity between such

two trustees, as neither represents the other, and the subject matter of each trust is separate and distinct. The only connection between the two trusts is that the subject matter of each was formerly owned by the same person, to-wit: the decedent prior to his death. This of course does not constitute privity.

This same rule was applied in *Ingersoll v. Coram*, holding that there was no privity between the Montana representative and one appointed by the Massachusetts court. Here again was involved the question of privity between trustees of two separate and distinct trusts, having separate and distinct subject matters.

In *Troxell v. Delaware, L. & W. R. Co.*, in so far as this court spoke on the subject of identity of parties, it was dealing with the same question, to-wit: the question of privity between two separate trustees, of two separate trusts, namely, the trustee for bringing suit under the Federal Employers' Liability Act, the administrator, and the trustee for bringing suit under the Pennsylvania act, the widow. The *Troxell* case did not involve the question of privity between a trust and a cestui que trust, even though Mrs. Troxell was an ultimate beneficiary of each trust, because in the first action, she was suing as trustee under the Pennsylvania act.

The question of privity between a trustee and a cestui que trust, is determined by the case of *Corcoran v. Chesapeake & O. Ry.* (94 U. S. 741)

cited in our original brief.

It is, however, apparent that the Troxell case was decided on the familiar doctrine announced by Mr. Justice Brandes, in *Southern Pacific v. Bogart*, 250 U. S. 483 (490).

"Nor (is there) any reason why the minority who failed in the attempt to recover on one theory because unsupported by the facts, should not be permitted to recover on another for which the facts afford ample basis."

or as stated by the Circuit Court of Appeals of the Eighth Circuit, in *Wheeling & L. E. R. Co. v. Carpenter*, 264 Fed. 772 (776) :

"It is fundamental that one is not estopped from pursuing a remedy that he is entitled to merely because of his endeavor to avail himself of a remedy that he was never entitled to."

See also cases cited on page 442, of the Troxell case.

Concededly *Dennison v. Payne* does support respondent, but it is submitted that the conclusion reached is erroneous for the same reason that the decision below is. The *Dennison* case is certainly not with the weight of authority—in fact, it is the only decision that our search has revealed which holds that there is no privity between trustee and cestui que trust. It is not supported by the *Brown*, *Coram* or *Troxell* decisions, because as indicated, they do not involve that point, but involve only the question of privity between two separate trustees. It is contrary to the *Corcoran* decision, and to every other decision of which we are aware.

D.

## EQUITABLE ESTOPPEL AND ELECTION.

Respondent devotes certain portions of his brief to the above subject. We have never asserted, and do not now assert any claim based on either doctrine.

The foregoing applies in part to the companion case of Chicago, Rock Island & Pacific Railway Company v. Fred A. Elder, October Term, 1925, No. 684, although no separate reply brief is filed in that case.

The judgment below should be reversed.

Respectfully submitted,

M. L. BELL,

New York, New York,

W. F. DICKINSON,

DANIEL TAYLOR,

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THOMAS D. O'BRIEN,

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EDWARD S. STRINGER,

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Counsel for Petitioner.

**No. 683**

WM. R. STANB  
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IN THE  
**UNITED STATES SUPREME COURT**

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CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COM-  
PANY,

*Petitioner,*

vs.

A. D. SCHENDEL, as Special Administrator of the  
Estate of CLARENCE Y. HOPE, Deceased,

*Respondent.*

---

BRIEF IN SUPPORT OF PETITION FOR  
WRIT OF CERTIORARI.

---

M. L. BELL,

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DANIEL TAYLOR,

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THOMAS D. O'BRIEN,

EDWARD S. STRINGER,

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Counsel for Petitioner.

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IN THE  
**UNITED STATES SUPREME COURT**

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CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COM-  
PANY,

*Petitioner,*

vs.

A. D. SCHENDEL, as Special Administrator of the  
Estate of CLARENCE Y. HOPE, Deceased,

*Respondent.*

---

BRIEF IN SUPPORT OF PETITION FOR  
WRIT OF CERTIORARI.

---

B.

The opinion of the court below, the Supreme Court of Minnesota, is reported in Schendel v. Chicago, R. I. & P. Ry. Co. 204 N. W. 552. It is not yet reported in the official Minnesota Reports.

C.

1. The date of the judgment sought to be reviewed is June 30, 1925. (Record 231.)

2. The specific claims advanced and rulings made which are relied upon as the basis of this court's jurisdiction are:

Petitioner claimed both in the District Court of Steele County, Minnesota, and in the Supreme Court of Minnesota, that a certain judgment of the District Court of Lucas County, Iowa, was res judicata, and a bar to plaintiff's cause of action, under the full faith and credit clause of the Constitution of the United States, Section 1, Article IV. This claim of your petitioner was determined both by the District Court of Steele County, Minnesota, and by the Supreme Court of Minnesota against your petitioner. Petitioner especially set up and claimed a right under the Constitution of the United States, and the right so expressly set up and claimed was denied by the Supreme Court of the State of Minnesota. (R. 163, 72, 73, 75, 76, 188, 189, 191, 193-197, 210-228.)

3. The jurisdiction of this court is invoked in this cause, under Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, "An act to amend the Judicial Code, and to further define jurisdiction of the Circuit Courts of Appeal, and of the Supreme Court, and for other purposes."

4. The jurisdiction of this court is sustained by the following:

*Forsyth v. Hammond*, 166 U. S. 506,

Subsection (a), Section 5, Rule 35, of Revised Rules, effective July 1, 1925.

## D.

## STATEMENT OF THE CASE.

This case, and its companion case, *Chicago, R. I. & P. Ry. Co.*, Petitioner, v. *Fred A. Elder*, Respondent, in which case an application for a writ of certiorari is likewise filed in this court, grew out of the same accident. The two cases, while differing in some respects, have many points in common. The two cases should be considered together.

Decedent was killed in a wreck near Pershing, Iowa (within the state of Iowa), on February 4, 1923. Negligence is conceded. The question at issue was whether decedent was engaged in interstate commerce so that the remedy was under the Federal Employers' Liability Act of April 22, 1908, or in intrastate commerce, so that the remedy was under the Workmen's Compensation Act of Iowa. (R. 91-140.) A summary of its provisions is found in *Hunter v. Colfax Consolidated Coal Co.*, 175 Ia. 245, 154 N. W. 1037, and in *Hawkins v. Bleakly*, 243 U. S. 210, and in the opinion of the court below (R. 220). Petitioner contends that a certain unreversed and final judgment entered in the District Court of Lucas County, Iowa, on June 2, 1923, conclusively determined the commerce to be intrastate. This judgment reads as follows:

"The court further finds \* \* \* that the said Clarence Y. Hope was not at the time of his death engaged in interstate commerce, and that Mrs. Clarence Y. Hope as the sur-

viving widow of the said decedent is entitled to an award of compensation under the Iowa Workmen's Compensation Law \* \* \*." (R. 163.)

Eliminating entirely for the present this Iowa judgment, and viewing the facts as shown by the record most favorably to plaintiff, at most it made a question of fact as to whether decedent was engaged in interstate commerce. Petitioner contended in the court below, and still contends, that (even without the Iowa judgment) decedent was engaged in intrastate commerce as a matter of law. But for the purpose of argument only, we will concede an issue of fact.

Petitioner contends that under the full faith and credit clause of the Constitution of the United States, this judgment concluded the entire matter, and the denial of petitioner's claim in this respect constitutes the basis of this court's jurisdiction.

Plaintiff (respondent) began an action under the Federal Employers' Liability Act, in the District Court of Steele County, Minnesota, on February 21, 1923 (R. 2). On March 2, 1923, petitioner began a proceeding before the Industrial Commissioner of Iowa, under and pursuant to the Iowa Workmen's Compensation Act (R. 143). Under the Iowa act, the adverse party is the widow, and Mrs. Hope was duly made a party to the proceeding. She was likewise the sole beneficiary under the Federal Employers' Liability Act, if there had been any cause of action under that act (R. 72, fols. 214, 215). She answered asserting that the

deceased was engaged in interstate commerce and hence that the Iowa Compensation Act was without application (R. 144). The arbitration committee provided for by the Iowa Compensation Act found that the deceased was engaged in intrastate commerce (R. 147). Mrs. Hope filed an application in review, and the Industrial Commissioner affirmed the arbitration committee, and determined that deceased was engaged in intrastate commerce (R. 150). Mrs. Hope appealed from that decision to the District Court of Lucas County, Iowa (R. 158), and that court, on June 2, 1923, entered the judgment just mentioned, affirming the Industrial Commissioner, and adjudging specifically that the deceased was engaged in intrastate commerce (R. 162-164).

In the action in the Steele County District Court, the judgment of the District Court of Lucas County was pleaded as *res adjudicata*, and as a bar under the full faith and credit clause of the United States Constitution (R. 11-17). The action was tried on March 4, 1924, resulting in a verdict for the plaintiff, and necessarily a finding by the jury that the decedent was engaged in interstate commerce, which was the only question submitted to it (R. 18, 77-85, 187).

Petitioner offered in evidence a copy of the Iowa judgment, including all proceedings leading up to it, duly exemplified under the Federal Constitution (R. 72, 73, 147-166). Upon objection, it was excluded by the court generally, although permitted in evidence for the purpose of a motion by

petitioner for a directed verdict (R. 73, 74). Such motion by petitioner for a directed verdict was thereafter made upon the strength of the Iowa judgment (R. 75, 76), and denied by the court (R. 76). After the verdict, the court denied a motion for judgment notwithstanding the verdict, or for a new trial on the same ground (R. 188-192, 193-197). From a judgment entered on the verdict (R. 198), petitioner appealed to the Supreme Court of Minnesota (R. 200), urging the same ground of reversal (R. 205-207). The Supreme Court filed its opinion and order for judgment on June 19, 1925, in all things sustaining the lower court (R. 210 to 228), and on June 30, 1925, final judgment of affirmance was entered in the Supreme Court (R. 231).

The Federal question, the denial of petitioner's right under the full faith and credit clause of the Constitution, was squarely raised at the following stages of the proceedings:

1. Second supplemental answer (R. 15).
2. Offer of the Iowa judgment in evidence (R. 72, 73).
3. Motion for a directed verdict (R. 75, 76).
4. Motion for judgment notwithstanding the verdict or a new trial, (R. 188-192, particularly folios 565, 566 and 572).
5. In the Supreme Court upon appeal from the judgment (R. 205-207).



## E.

## ASSIGNMENTS OF ERROR.

The Supreme Court of the State of Minnesota erred:

1. In refusing to give full faith and credit to the final judgment of the District Court of Lucas County, Iowa, contrary to Section 1, of Article IV, of the Constitution of the United States.

2. In entering final judgment affirming the District Court of Steele County, Minnesota, in refusing to give full faith and credit to the final judgment of the District Court of Lucas County, Iowa, contrary to Section 1, of Article IV, of the Constitution of the United States.

3. In entering judgment affirming the District Court of Steele County, Minnesota, in:

a. Refusing to receive in evidence the exemplified copy of the Iowa judgment.

b. Refusing to direct a verdict for the defendant (petitioner) because of said Iowa judgment.

c. Refusing to grant judgment for the defendant (petitioner) notwithstanding the verdict of the jury against it, because of said Iowa judgment.

d. Refusing to grant a new trial because of said Iowa judgment.

e. Entering judgment in favor of plaintiff (respondent) and against defendant (petitioner) contrary to said Iowa judgment.

## F.

## ARGUMENT.

The Supreme Court of Minnesota in its opinion holds that the judgment of the District Court of Lucas County, Iowa, was not entitled to full faith and credit under the Federal Constitution, because:

## I.

The Iowa judgment was not binding for the reason that:

“Without authority controlling or certainly guiding us, we are content to hold that the substantive right given the employe or his representative by Congress under express constitutional grant, with the courts to which he may go for its enforcement pointed out to him, is a superior substantive right; and that when he or his representative has chosen the forum to which to submit his cause, he cannot, against his objection and upon the initiative of his employer, be required to submit it in a summary proceeding commenced later under a compensation act.” (R. 224.)

## II.

There was no identity of parties in the two actions the party to the Iowa judgment being the widow (although the sole beneficiary in any event under the Federal act), and the party to the Minnesota action being the administrator (although merely the trustee for such sole beneficiary for the purpose of suit). (R. 225-227.)

## I.

## BINDING EFFECT OF THE IOWA JUDGMENT.

The court's reasoning is

(a) Manifestly wrong; but

(b) Even if right, as an abstract proposition of law, does not support the conclusion reached because it only involves the correctness of the Iowa court's decision and not its jurisdiction.

(a)

It should be unnecessary to cite authorities for the familiar rule that where a fact is once established by a judgment of a tribunal of competent jurisdiction, it cannot be litigated in another action.

*Southern Pacific Ry. v. United States*, 168 U. S. 1.

While possibly the Iowa judgment is not res adjudicata in its broad sense in this action, it is certainly an estoppel by verdict in that it squarely determined the character of the commerce, and that determination is conclusive in this action.

*Sheets v. Ramer*, 125 Minn. 98, 145 N. W. 787.

*Meyers v. International Co.*, 263 U. S. 64.

*Cromwell v. Sac County*, 94 U. S. 351.

As we read the opinion of the court below, it recognizes this rule, but holds that since there was an assertion of a cause of action under the Federal Employers' Liability Act, the Iowa tribunal was

immediately divested of its right to determine whether there was a cause of action under its own laws. A moment's reflection will clearly demonstrate the fallacy of the court's reasoning.

Absolutely no authority is cited to support the court's conclusion. THE ONLY TWO AUTHORITIES IN THE COUNTRY SQUARELY IN POINT, HOLD CONTRARY TO THE CONCLUSION REACHED BELOW. *Williams v Southern Pacific*, 202 Pac. 356, 54 Cal. App. 571 (certiorari denied, 258 U. S. 622), holds squarely that such a judgment in a compensation proceeding is conclusive in an action brought under the Federal act. It is absolutely impossible to distinguish the *Williams* case from the case at bar, although the court below attempts a fanciful distinction. Likewise, the case of *Dennison v. Payne*, 293 Fed. 333 (Circuit Court of Appeals, of the Second Circuit), while differing with the California court in the *Williams* case on the question of identity of parties, holds squarely that where there is identity of parties, the judgment in the compensation case is binding in the action under the Federal act.

There are involved two sovereign powers, the State of Iowa, and the United States. Each is supreme in its own sphere, the State as to intrastate commerce, the United States as to interstate commerce. The United States cannot by legislation, regulate or interfere with the conduct of intrastate commerce, or add to or subtract from any substantive right given by the state law, except as may be necessary for the protection of interstate commerce.

*First Employers' Liability Cases*, 207 U. S. 463.

A state may neither regulate nor interfere with interstate commerce, nor can the state by legislation, add to or subtract from any substantive right given by Congress. In that field, the Federal law is supreme.

*Seaboard Air Line v. Horton*, 233 U. S. 492.

*Erie Ry. v. Winfield*, 244 U. S. 170.

*N. Y. Central Ry. v. Winfield*, 244 U. S. 147,

*N. Y. Central Ry. v. Tonsellito*, 244 U. S. 360.

The state of Iowa has legislated as to the remedy to be given for an injury occurring in intrastate commerce, and has created a tribunal for enforcing such remedy. That tribunal is the Industrial Commissioner, subject to review by the courts. He has, under the specific terms of the act creating his office, jurisdiction only in cases occurring in intrastate commerce.

The United States has, by the Federal Employers' Liability Act, legislated as to the remedy for an injury occurring in interstate commerce, and while not creating a new tribunal for the enforcement of rights under that act, in effect it has done so by utilizing the courts of the state and Federal government already in existence. These tribunals have jurisdiction (as to accidents occurring in Iowa) only of accidents in interstate commerce.

In order that either tribunal may exercise jurisdiction, it must find the jurisdictional facts. It

necessarily has authority to determine whether it has jurisdiction. The Iowa tribunal therefore has jurisdiction to determine whether the commerce is interstate or intrastate. A finding of interstate commerce ousts it of jurisdiction.

Conversely (as to Iowa accidents), the tribunals for enforcing the Federal act likewise have authority to determine whether they have jurisdiction, and consequently authority to determine the character of the commerce. A finding of intrastate commerce ousts them of jurisdiction.

We have therefore, a situation where both tribunals have authority to determine the facts upon which their respective jurisdictions depend. The first final judgment entered, no matter in which tribunal, determines the matter for all times. It makes no difference which proceeding or action was started first. It is not the final judgment in the first suit that governs, but the first final judgment, although it may be in the second suit.

*Boatman's Bank v. Fritzlen*, 135 Fed. 650.

*Allis v. Davidson*, 23 Minn. 442.

*Insurance Co. v. Harris*, 97 U. S. 331.

*Schuler v. Israel*, 120 U. S. 506.

See also the authorities cited in

*Williams v. Southern Pacific Ry.* 202 Pac.  
356, 54 Cal. App. 571.

Had the court below determined that the deceased was engaged in interstate commerce before the Iowa court found to the contrary, that finding,

until set aside, would have been binding on the Iowa tribunal in any proceeding brought under the Iowa Compensation Act.

*Jackson v. Industrial Board*, 280 Ill. 526, 117 N. E. 705.

Since however the Iowa tribunal determined the character of the commerce to be intrastate before the question came up for determination in Minnesota, the Iowa judgment was conclusive upon the Minnesota courts.

The court below ignored the Iowa judgment because the jury below disagreed with the Iowa court on an issue of fact. The court below takes the position that since interstate commerce was asserted, the court in which it was asserted was the only tribunal that could determine whether it existed. Stating it another way, it held that the Iowa court could not determine its own jurisdiction. Merely to state the proposition is to demonstrate its unsoundness.

(b)

Even if, as an abstract proposition, the conclusion of the court below is sound, it does not involve the jurisdiction of the Iowa court, but only the correctness of that court's decision.

The court below holds that a party who has commenced an action claiming under the Federal act, *cannot be required* to litigate the interstate commerce question before the Industrial Commissioner. The barrier which the court below does not

attempt to, and of course could not get over, is that the Iowa court in this particular case determined that he *could be required* to do exactly this.

If the court below is right, it merely means that the Iowa court was wrong in the conclusion it had reached. If the Iowa court was wrong, the way to correct the error was to appeal and not by a collateral attack upon its judgment.

Thus in *23 Cyc, 1088*, it is stated:

“Where the court judicially considers and adjudicates the question of its jurisdiction and decides that the facts exist which are necessary to give it jurisdiction of the case, *the finding is conclusive and cannot be controverted in a collateral proceeding.*”

See also *34 Corpus Juris 552* and cases cited.

In *Taylor vs. Robert Ramsey Co.*, 114 Atl. 830, the Supreme Court of Maryland held that the jurisdiction of the State Industrial Commission to make an award under the Compensation Act, was not open to collateral attack. The Industrial Commission had awarded compensation to a man engaged in a maritime occupation. This court thereafter in another case held that a state could not include men employed in maritime occupations within its compensation act.

*Southern Pac. Co. vs. Jensen*, 244 U. S. 205.

Therefore though the Industrial Commission was clearly wrong, nevertheless it was held that the award under the compensation act was valid.



The only way to correct an error in the conclusion of the Iowa court having jurisdiction, is by direct appeal.

*Toy Toy vs. Hopkins*, 212 U. S. 542,  
where this court held (syllabus) :

“Even though the Circuit Court erroneously retains jurisdiction of a criminal case against an allottee Indian, *its judgment is not void but should be corrected on appeal or by writ of error and cannot be attacked in habeas corpus proceedings.*”

Likewise in the case of *Dowell vs. Applegate*, 152 U. S. 327, this court said, on page 340 :

“These authorities above cited, it is said, do not meet the present case, because the ground on which it is claimed the Federal Court assumed jurisdiction was insufficient in law to make this case one arising under the laws of the United States. But that was a question which the Circuit Court of the United States was competent to determine in the first instance. Its determination of it was the exercise of jurisdiction. *Even if that court erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it, and could not be questioned by them or either of them collaterally, or otherwise than on writ of error or appeal to this court.*”

## II.

## IDENTITY OF PARTIES.

In addition to the rule already referred to, that a judgment is binding upon the parties to an action, there is the further rule that a judgment is also binding upon those in privity with the parties. The question presented is:

Is there such privity between Mrs. Hope and the plaintiff (the administrator) that a judgment to which Mrs. Hope is a party, binds the administrator? The court below held that there was no such privity.

The case of *Williams vs. Southern Pacific Ry.* 202 Pac. 356, 54 Cal. App. 571, to which reference has been made, on exactly identical facts, holds that there was privity and that the administrator was bound. Nothing could be added to the reasoning in that case. The Circuit Court of Appeals, in *Dennison vs. Payne*, 293 Fed. 333, reached an opposite conclusion. With all respect for that tribunal, it is submitted that the decision is poorly reasoned, and not in accord with the decisions of this court.

By the judgment of the District Court of Iowa, it was adjudged that Hope was engaged in intrastate commerce. Jessie Hope, the widow, was a party to that action. In this action it was contended by plaintiff and decided by the court below, that Hope was engaged in interstate commerce. This action is brought by the administra-

tor under the Federal Employers' Liability Act, which provides that the action may be maintained by the personal representative "for the benefit of the surviving widow." In this case the widow is the sole beneficiary and is entitled to any recovery in this action. There are no dependent children, it being stipulated upon the trial that the step-children mentioned in the complaint were not entitled in fact to any recovery in this action (R. 72).

Neither the representative, the plaintiff in this action, nor the estate, has any interest in the cause of action or the recovery. This, as indicated, belongs solely to the widow, the representative being merely the trustee for the purpose of bringing suit.

*Gulf Ry. Co. vs. McGinnis*, 228 U. S. 173.

In the Iowa action, Mrs. Hope was the real party in interest as well as the nominal party; in the Minnesota action she is the real party in interest, but not the nominal party.

The view of this court on the question of a privity existing between the widow as beneficiary, and the administrator is clearly shown by the case of *M. K. & T. Ry. Co. vs. Wulf*, 226 U. S. 570. A widow brought the suit, alleging a cause of action under the Federal Employers' Liability Act. Of course under that act she had no authority to sue. In the meantime, the statute of limitations ran. An application was then made to substitute the administrator as plaintiff. This was permitted, this court holding that no new cause of action was introduced in the case, saying:

"Nor do we think it was equivalent to the commencement of a new action so as to render it subject to the two years limitation prescribed by Section 6, of the Employer's Liability Act. *The change was in form rather than in substance.*"

In the case of *Lathrop vs. Schutte*, 61 Minn. 196, 63 N. W. 493, the court in speaking of an action brought by the father under the statute, for injuries to the minor child, said:

"Whatever is recovered, if anything, belongs to the child, and the father holds it in trust for him. \* \* \* The judgment in this action by the parent is a bar to any subsequent action for the same cause prosecuted by the minor, by his guardian, general or ad litem, or by himself, when he reaches majority."

In the case of *Bamka vs. Omaha Ry.*, 61 Minn. 549, 63 N. W. 1116, the court said:

"For in an action brought by a person as an administrator or as a guardian, general or special, he is not a party properly speaking, although he is nominally. The real party is the estate he may represent as administrator or the minor in whose behalf he, as guardian, prosecutes the action."

In *Telford vs. McGillis*, 130 Minn. 397, 153 N. W. 758, the court said:

"It does not matter that intervenor was not a formal party to this action. It was brought in the name of his representative and this concludes him."

In *Corcoran vs. Chesapeake & Ohio Ry.*, 94 U. S. 741, Corcoran was trustee for the bondholders. As such trustee he brought suit, but was defeated. Later he brought a second suit as a bondholder. It was held that the judgment against him as trustee bound him individually because, as trustee, he represented himself individually.

In the case of *In Re Bell (Cal.)*, 95 Pac. 372, the court said:

"A judgment denying the right of a widow to any credit for family allowances rendered in proceedings for the settlement of her account as administratrix is conclusive on her right to a family allowance in a subsequent proceeding therefor, instituted by her individually, *she being, in both proceedings, the real party in interest*, asserting individual and not representative rights."

In the case of *In re Parks*, 166 Ia. 403, 147 N. W. 850, the court said:

"It may be conceded that theoretically the former suit against Mrs. Parks individually was not against the same defendant as is the present suit against her as administratrix of an estate. Under the facts of this case, however, *such theoretical distinction loses its application and is without practical value to the appellant.* \* \* \* If there were any persons beneficially interested in such an estate other than herself individually, a somewhat different question would be presented. But there are none. \* \* \* Mrs. Parks, as administratrix, therefore, is representative of no

other beneficiary than herself as sole heir of the decedent."

In the case of *Chandler vs. White Oak Creek Lumber Co. (Tenn.)*, 173 S. W. 449, Chandler held certain land as trustee for himself and others. Suit was brought against him individually (not as trustee), and against all other beneficiaries of the trust, to quiet title. Judgment was obtained. Later, as trustee, he brought suit to recover possession of this land. It was held that he, as trustee, was estopped by this judgment against the beneficiaries of the trust. This is exactly the situation here.

In 23 *Cyc.* page 1245, the rule is stated as follows:

"Although one is not nominally or formally a party to an action, he will be concluded by the judgment therein if he was represented, as to his rights or interests in the subject matter, by a party legally entitled to represent him, or who actually conducted the prosecution or defense on the behalf and for the benefit of such person."

In support of this rule (see Note 32), there are cited cases from the Supreme Courts of sixteen states, as well as the courts of the United States and Canada.

See also 34 *Corpus Juris* 999 and cases cited.

In *Black on Judgments*, 2nd Edition, Section 538, it is stated:

"Where a suit is prosecuted by one person for the use of another, the latter being the equitable owner of the claim and the real party in interest, a judgment will bar a second suit by the latter."

In *Jackson vs. Industrial Board*, 280 Ill. 526, 117 N. E. 705, the court said:

"It is argued by the plaintiff in error that notwithstanding the fact that the Circuit Court by its judgment on the demurrer determined that the deceased was not engaged in interstate commerce, and for that reason gave judgment on demurrer, the judgment of the court in that case does not estop plaintiff in error to contend in this proceeding that the deceased was in fact engaged in interstate commerce. The court by its judgment in that case determined one question of fact that necessarily defeated the administratrix in that suit, i. e., that the deceased was not engaged in interstate commerce, and for that reason she could not maintain her suit under the Federal Employers' Liability Act. That judgment completely estops plaintiff in error as well as the administratrix from contending in any other suit between the same parties that the deceased was injured while employed by plaintiff in error, in interstate commerce."

See also

*Grant vs. Winona Ry.*, 85 Minn. 422, 89 N. W. 60.

*Connelly vs. Connelly*, 26 Minn. 350.

*Parsons vs. Urie*, 104 Md. 238, 64 Atl. 927.

*Rowell vs. Smith*, 123 Wis. 510, 102 N. W. 1.

*Black on Judgments*, 2nd Ed., Sec. 537.

The *Dennison* case cites *Troxel vs. Delaware & Lackawanna Ry.*, 227 U. S. 434, as an authority that the Iowa judgment is not binding on the plaintiff, entirely ignoring the *Williams* case. The *Williams* case so clearly distinguishes the *Troxel* case as to leave nothing more to be said.

There is certainly nothing in the opinion in the *Troxel* case which suggests that this court intended to depart from the well established doctrine announced in the *Corcoran* case (94 U. S. 741) already referred to, where this court held that a trustee and a cestui que trust were in privity, and said:

"It would be a new and very dangerous doctrine in the equity practice to hold that the cestui que trust is not bound by the decree against his trustee *in the very matter of the trust for which he was appointed.*"

The court below was clearly wrong in the determination of a Federal question arising under the Constitution of the United States. A writ of certiorari should be granted to correct its judgment.

Respectfully submitted,

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 683

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY  
COMPANY,

*Petitioner*

vs.

A. D. SCHENDEL, as Special Administrator of the Estate  
of Clarence Y. Hope, Deceased,

*Respondent.*

## BRIEF OF PETITIONER

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*Re final judgment*

## B.

The opinion of the court below, the Supreme Court of Minnesota, is reported in *Schendel vs. Chicago, Rock Island and Pacific Railway Company*, 204 N. W. 552, filed June 19, 1925. It is not yet reported in the official Minnesota Reports.

## C.

1. The date of the judgment sought to be reviewed is June 30, 1925. (R. 122.)

2. The specific claims advanced and the rulings made which are relied upon as the basis of this court's jurisdiction are:

Petitioner claimed both in the District Court of Steele County, Minnesota, and in the Supreme Court of Minnesota that a certain judgment of the District Court of Lucas County, Iowa, was *res judicata* and a bar to plaintiff's cause of action under the full faith and credit claims of the Constitution of the United States, Section 1, Article IV. This claim of your petitioner was determined both by the District of Steele County, Minnesota, and by the Supreme Court of Minnesota, against your petitioner. Petitioner especially set up and claimed a right under the Constitution of the United States, and the right so expressly set up and claimed was denied by the Supreme Court of the State of Minnesota. (R. 7, 8, 43, 44, 45, 104, 105, 106-109, 113-122.)

3. The jurisdiction of this court is invoked in this cause under Section 237 of the Judicial Code as amended by the Act of February 13, 1925, "An act to amend the Judicial Code and to further define jurisdiction of the Circuit Courts of Appeal, and of the Supreme Court, and for other purposes."

4. The jurisdiction of this court is based upon the order of this court dated October 19, 1925, granting a writ

of certiorari to review the final judgment of the Supreme Court of Minnesota, this order being made under Rule 40 of the Revised Rules of this court effective July 1, 1925. (R. 123.)

## D.

## STATEMENT OF FACTS.

This court granted a writ of certiorari to review the final judgment of the Supreme Court of Minnesota.

This case and its companion case *Chicago, Rock Island and Pacific Railway Company*, petitioner, vs. *Fred A. Elder*, Respondent (No. 684, October term, 1925), in which case a writ of certiorari has likewise been granted by this court, grew out of the same accident. The two cases, while different in some respects, have most points in common. The two cases should be considered together.

Decedent was killed in a wreck near Pershing, Iowa, (within the State of Iowa), on February 4, 1923. The question at issue was whether decedent was engaged in interstate commerce so that the remedy was under the Federal Employers' Liability Act of April 22, 1908, or intrastate commerce so that the remedy was under the Workmen's Compensation Act of Iowa. (R. 53-80.) A summary of the provisions of the state act is found in

*Hunter vs. Colfax Consolidated Coal Co.,*  
175 Iowa, 245, 154 N. W. 1037,

and in

*Hawkins vs. Bleakly*, 243 U. S. 210,  
and in the opinion of the court below. (R. 113-122.)

Petitioner contends that a certain unreversed judgment entered in the District Court of Lucas County, Iowa, on June 2, 1923, conclusively determined the commerce to be intrastate. This judgment reads as follows:

"The Court further finds \* \* \* that said Clarence Y. Hope was not at the time of his death engaged in interstate commerce and that Mrs. Clarence Y. Hope as the surviving widow of said decedent is entitled to an award of compensation under the Iowa Workmen's Compensation Law." (Record 92.)

Eliminating entirely for the moment the effect of this Iowa judgment, and viewing the other facts as shown by the record most favorably to the plaintiff-respondent, the most that could be claimed by plaintiff-respondent is that the evidence made a question of fact as to whether decedent was engaged in interstate commerce. Petitioner contended in the court below, as will be seen from the opinion below, (R. 114-116), and still contends that (even without the Iowa judgment) decedent was engaged in intrastate commerce as a matter of law.

We are, however, arguing the question of the effect of the Iowa judgment as though the evidence, aside from that judgment, made, as the court below held, an issue of fact for the jury's determination.

Briefly, the evidence showed with respect to interstate commerce that decedent and all his train crew were residents of Chariton, Iowa, the station just south of Pershing on the main line. On the day of the accident the crew received orders to work the mines, and proceeded north on the main line from Chariton to Pershing, and thence down a spur track to Mine No. 2. Here they picked up nine loaded cars of coal, which they brought back to Pershing and put on the side tracks at that point. Of the nine cars in this first drag, seven were consigned to points within the state of Iowa and two to points outside of that state. In other words, the last two were interstate cars. (Record 15, 51.)

After the first drag of cars was spotted at Pershing, the crew went down the spur track to Mine No. 3 and brought back ten cars of coal. All of these cars were intrastate cars consigned to points within the state of Iowa. (Record 16-18, 51.)

Fred A. Elder, one of the brakemen of the crew, and respondent in the companion case referred to, testified that



after the second drag was brought in the crew moved the second drag against the first drag and set the brakes on the two interstate cars on the first drag. (Record 33, 34.)

The second drag arrived at Pershing about noon. It being Sunday, the crew, after receiving a wire from the dispatcher that the main line track to Chariton was clear, started to Chariton for dinner with only an engine and a caboose, and without any other cars. On the way in, they collided with a north bound passenger train, resulting in the wreck as a result of which decedent died. The accident was caused by a mistake of the dispatcher in his train orders. (Record 36.)

The court below held that this record made a question of fact for the jury on interstate commerce, and refused to give any effect whatever to the Iowa judgment, to which we shall now refer. (Record 46, 47.)

Respondent began this action under the Federal Employers' Liability Act in the District Court of Steele County, Minnesota, on February 21, 1923. (R. 1.) On March 2, 1923, petitioner began a proceeding before the Industrial Commissioner of Iowa under and pursuant to the Iowa Workmen's Compensation Act. (R. 81, 82.) Under the Act, the adverse party is the widow, (Sub. 4, Par. c. Sec. 2477-M-16, R. 68), and Mrs. Hope, decedent's widow, was duly made a party to the proceedings. She was likewise the sole beneficiary under the Federal Employers' Liability Act, if there were any cause of action under that act. (R. 43.) She answered, asserting that the deceased was engaged in interstate commerce, and hence that the Iowa Compensation Act was without application. (R. 82, 83.) The arbitration committee provided for by the Iowa Compensation Act, found that decedent was engaged in intrastate commerce. (R. 84.) Mrs. Hope filed an application in review, and the Industrial Commissioner affirmed the arbitration

committee and determined that deceased was engaged in intrastate commerce. (R. 85-89.) Mrs. Hope appealed from that decision to the District Court of Lucas County, Iowa, (R. 90), and that Court, on June 2, 1923, entered the judgment just mentioned affirming the Industrial Commissioner and adjudging specifically that the deceased was engaged in intrastate commerce. (Record 91-92.)

All these proceedings were strictly in accordance with the Iowa Workmen's Compensation Act, which appears in full in the record. (R. 53-80.) Its provisions can best be summarized by quoting from the opinion of the Supreme Court of Iowa in the case of

*Hunter vs. Colfax Consolidated Coal Co.,*  
175 Ia. 245, 154 N. W. 1037, 1060.

"If the parties in interest fail to reach an agreement in regard to compensation under the act, either party may notify the commissioner, who thereupon forms a committee of arbitration of three of which the commissioner is one and is chairman. The other two shall be named respectively by the two parties. If a vacancy occurs it shall be filled by the party whose representative is unable to act. Section 27. Then comes provisions as to the oath to be administered the arbitrators, and other provisions as to filling vacancies. Sections 28, 29.

It is next provided the committee shall make such inquiries and investigations as it shall deem necessary, where the inquiry shall be held, and that the decision of the committee, together with a statement of evidence submitted before it, its findings of fact, rulings of law, and any other matters pertinent to questions arising before it, shall be filed with the commissioner. Unless a claim for review is filed by either party within five days, the decision becomes enforceable under the provisions of the act. Section 30. The commissioner has power to subpoena, administer oath, examine such books and records of the parties to a proceeding or investigation as relate to questions in

dispute or under investigation; and may make rules and regulations, not inconsistent with the act, for carrying out its provisions. Section 25.

If a claim for review is filed, the commissioner shall hear the parties, and may hear evidence in regard to any or all matters pertinent thereto, and may revise the decision of the committee in whole or in part, or refer the matter back to it for further findings of fact, and he shall file its decision with the record of the proceedings, and notify the parties. No party shall, as a matter of right, be entitled to a second hearing upon any question of fact. Section 33."

See Secs. 2477-M-26 to 33, (Record 72-75.)

Section 2477-M-33, (R. 75), provides for an appeal to the District Court.

In this action, in the District Court of Steele County, Minnesota, the judgment of the District Court of Lucas County, Iowa, was pleaded as *res judicata*, and as a bar under the full faith and credit clause of the United States Constitution, (R. 7-8.) The action was tried on March 4, 1924, (R. 9), resulting in a verdict for the plaintiff, (R. 103), and necessarily a finding by the jury that the decedent was engaged in interstate commerce, which was the only question submitted to it. (R. 46-47.)

Petitioner offered in evidence a copy of the Iowa judgment, including all proceedings leading up to it, duly exemplified according to federal requirements. (R. 43, 81-93.) Upon objection, it was excluded by the court generally, although permitted in evidence for the purpose of a motion by petitioner for a directed verdict. (R. 43-44.) Such motion by petitioner for a directed verdict was thereafter made upon the strength of the Iowa judgment, (R. 45), and denied by the court. (R. 45.) After the verdict, the court denied a motion for judgment notwithstanding the verdict or for a new trial on the same ground. (R. 104-109.)

From a judgment entered on the verdict, (R. 109), petitioner appealed to the Supreme Court of Minnesota (R. 110), urging the same ground of reversal. (R. 110-112.) The Supreme Court filed its opinion and order for judgment on June 19, 1925, in all things sustaining the lower court, (R. 113-122), and on June 30, 1925, final judgment of affirmance was entered in the Supreme Court. (Record 122-123.)

Within the time allowed by law, (August 17, 1925) petitioner filed a certified copy of the record of this court, together with its application for a writ of certiorari. This writ was granted on October 19, 1925. (R. 123.)

The federal question, the denial of petitioner's rights under the full faith and credit clause of the Constitution, was squarely raised at the following stages of the proceedings:

1. Second Supplemental Answer. (Record 7-8.)
2. Offer of Iowa judgment in evidence. (Record 43-44.)
3. Motion for a directed verdict. (Record 45.)
4. Motion for judgment notwithstanding the verdict or a new trial. (Record 104-106.)
5. In the Supreme Court upon appeal from the judgment. (Record 110-112.)

## E.

## ASSIGNMENTS OF ERROR

The Supreme Court of the State of Minnesota erred:

## I

In refusing to give full faith and credit to the final judgment of the District Court of Lucas County, Iowa, contrary to Section 1 of Article IV of the Constitution of the United States.

## II

In entering final judgment affirming the District Court of Steele County, Minnesota, in refusing to give full faith and credit to the final judgment of the District Court of Lucas County, Iowa, contrary to Section 1 of Article IV of the Constitution of the United States.

## III

In entering judgment affirming the District Court of Steele County, Minnesota, in

(a) Refusing to receive in evidence the exemplified copy of the Iowa judgment.

(b) Refusing to direct a verdict for the defendant (petitioner) because of said Iowa judgment.

(c) Refusing to grant judgment for the defendant (petitioner) notwithstanding the verdict of the jury against it because of said Iowa judgment.

(d) Refusing to grant a new trial because of said Iowa judgment.

(e) Entering judgment in favor of plaintiff (respondent) and against defendant (petitioner) contrary to said Iowa judgment.

## F.

## SUMMARY OF ARGUMENT

1. The judgment of the District Court of Lucas County, Iowa, adjudging that decedent was engaged in intrastate commerce, constituted an estoppel by verdict and forever established that fact.

2. Since the fact of interstate commerce was asserted as a defense before the Iowa court, that court had jurisdiction to determine the fact as to the character of the commerce in spite of the fact that the same issue was involved in the action pending in the District Court of Steele County, Minnesota, the court below.

3. Even if the District Court of Lucas County, Iowa, ought not to have determined that issue, because the same issue was involved in the action in the court below, its ruling that it might determine the issue and its determination thereof at most constituted an error of decision, and did not affect its jurisdiction. If the Iowa court reached an erroneous conclusion, the way to correct it was by proper appellate procedure and not by collateral attack upon its judgment.

4. A judgment is binding not only upon the parties, but their privies. The respondent, as administrator, is in privity with the widow, since the administrator is merely trustee under the Federal Employers' Liability Act, for the benefit of the beneficiaries, and the widow was in this case the sole beneficiary.

5. In refusing to give effect to the judgment of the District Court of Lucas County, Iowa, the courts below violated petitioner's rights under the full faith and credit clause of the Constitution of the United States.

## ARGUMENT

The Supreme Court of Minnesota in its opinion holds that the judgment of the District Court of Lucas County, Iowa, was not entitled to full faith and credit under the federal Constitution because (1) the Iowa judgment was not binding for the reason that

“without authority controlling or a certainty guiding us, we are content to hold that the substantive right given the employe or his representative by congress under express constitutional grant that the courts to which he may go for its enforcement pointed out to him is a superior substantive right, and that when he or his representative has chosen the forum to which to submit his cause, he cannot against his objection and upon the initiative of his employer, be required to submit it in a summary proceeding commenced later under a compensation act.” (Record 119-120.)

(2) there was no identity of parties in the two actions, the party to the Iowa judgment being the widow (although the sole beneficiary in any event under the federal act), and the party to the Minnesota action being the administrator (although merely the trustee for such beneficiary for the purpose of suit). (Record 120-121.)

## I

*Binding Effect of the Iowa Judgment*

The court's reasoning is

(a) Manifestly wrong, but

(b) Even if right as an abstract proposition of law does not support the conclusion reached in this case because such abstract proposition involves only the correctness of the Iowa court's decision and not its jurisdiction.

## (a)

It should be unnecessary to cite authorities for the familiar rule that where a fact is once established by a judg-

ment of a tribunal of competent jurisdiction it cannot be litigated in another action.

In the case of

*Southern Pacific Ry. Co. vs. United States,*  
168 U. S. 1.

this court said that a fact

“so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of the rights of persons and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.”

The absolute necessity for such a rule is illustrated by this particular case.

Before the Iowa Industrial Commissioner there was no testimony by Elder as to shoving the cars in the second drag against the interstate cars in the first drag and the setting of the brakes on the two interstate cars in the first drag just before the crew went to dinner. This seems to have been a fact that was discovered later. Under the testimony before the Iowa Industrial Commissioner the last work done before the accident was purely and wholly an interstate move, i. e., bringing in ten wholly intrastate cars. The testimony before the Commissioner is not in the record, but the substance of it appears from the well reasoned opinion of the Commissioner. (R. 87-89.) Under the facts presented by that record, there could be no question but that the crew were engaged wholly in intrastate



commerce before going to Chariton for dinner, since the character of the work last done (intrastate) determines the character of the commerce.

*Illinois Central Ry. Co. vs. Peery*,  
242 U. S. 292.

*Smith vs. Interurban Railway Co. (Ia.)*,  
186 Iowa 1045, 171 N. W. 134 (Certiorari  
denied November 24, 1919, 251 U.  
S. 552.)

*Illinois Central Ry. Co. vs. Behrens*,  
233 U. S. 473.

*Erie Ry. Co. vs. Welsh*,  
242 U. S. 303.

Upon the trial of this case, Elder gave the additional testimony referred to about setting the brakes on the interstate cars, adding:

"This was the last thing we ever did." (Record 34.)

What plaintiff was permitted by the courts below to do was to violate the rule laid down in *Southern Pacific vs. United States*, *supra*, and after having been defeated on one theory and the evidence introduced, try the case again upon a new theory and upon different facts.

While possibly the Iowa judgment is not *res judicata* in its broadest sense, in that it may not be an estoppel by judgment, it certainly constitutes an estoppel by verdict in that it squarely determines the character of the commerce and that determination is conclusive in this action.

An estoppel by judgment can only arise where the two cases are upon the same cause of action. An estoppel by verdict arises where the two cases are upon different causes of action but the same fact is in issue and the fact decided and determined. In the case before the Iowa tribunal, the cause of action was under the Iowa Workmen's Compensation Act. In the present case, the cause of action asserted arises under the Federal Employers' Liability Act. In each

case the question was whether there was any cause of action at all, this depending upon whether plaintiff's decedent was, at the time, engaged in interstate or intrastate commerce. This fact, having been expressly determined in the Iowa court, constitutes an estoppel by verdict and is binding upon all parties, and their privies.

In *Sheets vs. Ramer*, 125 Minn. 98, 145 N. W. 787, the court said:

"A judgment on the merits is always an absolute bar to a second action between the same parties on the same cause of action. *West vs. Hennessy*, 58 Minn. 133, 59 N. W. 984; *Swank vs. St. Paul City Railway Co.*, 61 Minn. 423, 63 N. W. 1088; *Stitt vs. Rat Portage Lumber Co.*, 101 Minn. 93, 111 N. W. 948. Plaintiffs urge here that the causes of action are not the same. It may be that that contention is correct. The first action was one to set aside a conveyance as fraudulent. This action is to enforce an alleged agreement that the conveyance should not be absolute, but in trust. But it is not essential, to the operation of the estoppel, that the cause of action set up in the second action should be the same as that in the first. If a point at issue in the second action was decided in the first, the estoppel exists, no matter how different may be the form of action. *McClung vs. Condit*, 27 Minn. 45, 6 N. W. 399; *Swank vs. St. Paul City Ry Co.*, 61 Minn. 423, 63 N. W. 1088. It is settled law 'that the judgment of a court of concurrent jurisdiction directly upon the point, is, as a plea, a bar, or as evidence conclusive, between the same parties, upon the same matter, directly in question in another court,' even though the causes of action are not the same. *Duchess of Kingston's Case*, 2 Smith's Leading Cases, 693. This is termed 'estoppel by verdict'."

In *Meyers vs. International Co.*, 263 U. S. 64, the court said:

"The general principles which must govern here are laid down in an oft-quoted opinion of Mr. Justice Field

in *Cromwell vs. Sac County*, 94 U. S. 351. In that case suit had been brought upon coupons attached to bonds issued by the county for the erection of a school house, and it was adjudged that the bonds and coupons were invalid in the hands of one not a bona fide holder for value before maturity, and as the plaintiff had not shown himself to be such a holder, he could not recover. In a second suit on other coupons from the same bond, he proved that he was a holder for value before maturity and the county sought to defeat the second suit by pleading the judgment in the first as *res judicata*. It was held that the cause was different and that the first argument was not a bar. Mr. Justice Field said, (pp. 352, 353) :

‘In considering the operation of this judgment, it should be borne in mind, as stated by counsel, that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose.

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually

litigated and determined in the original action, not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action'."

In *Troxell vs. Delaware Y. & W. R. Co.*, 227 U. S. 434 (p. 440), this court said:

"Where the second suit is upon the same cause of action set up in the first suit, an estoppel by judgment arises in respect to every matter offered or received in evidence or which might have been offered to sustain or defeat the claim in controversy, but where the second suit is upon a different claim or demand, the prior judgment operates as an estoppel *only as to matters in issue or points controverted and actually determined in the original suit.*"

As we read the opinion of the court below, it recognizes this rule but holds that since there was an assertion of a cause of action under the Federal Employers' Liability Act, the Iowa tribunal was immediately divested of its right to determine whether there was a cause of action under its own laws. In other words, while Mrs. Hope tendered as a defense in the Iowa proceedings the fact that the commerce was interstate, the Iowa tribunal lacked jurisdiction to determine the merits of the defense tendered and had to let some other tribunal decide it. The fallacy of the reasoning of the court below is at once apparent.

Absolutely no authority is cited to support the court's conclusion. **THE ONLY TWO AUTHORITIES IN THE COUNTRY SQUARELY IN POINT HOLD CONTRARY TO THE CONCLUSION REACHED.**

*Williams vs. Southern Pacific,*

202 Pac. 356, 54 Cal. App. 571. (Certiorari denied, 258 U. S. 622.)

holds squarely that such a judgment in a compensation proceeding is conclusive in an action under the Federal Employers' Liability Act. It is absolutely impossible to

distinguish the Williams case from the case at bar, although the court below attempts a fanciful distinction. Likewise, the case of

*Dennison vs. Payne,*

293 Fed. 333 (C. C. A. 2nd Cir.),

while differing with the California court in the Williams case, on the question of parties, holds squarely that where there is identity of parties the judgment in the compensation case is binding in the action under the Federal Employers' Liability Act.

The opinion in the Williams case was written by the District Court of Appeals of California, but the Supreme Court of California on December 15, 1921, adopted the opinion by refusing a hearing, and this court denied certiorari, but upon the ground that there was no final judgment.

There are involved two sovereign powers: The State of Iowa and the United States. Each is supreme in its own sphere, the state as to intrastate commerce, the United States as to interstate commerce. The United States cannot by legislation regulate or interfere with the conduct of intrastate commerce, or add to or subtract from any substantive right given by the state law except as may be necessary for the protection of interstate commerce.

*First Employers' Liability Cases,*

207 U. S. 463.

A state may neither regulate nor interfere with interstate commerce, nor can the state by legislation add to or subtract from any substantive right given by Congress. In that field the federal law is supreme.

*Seaboard Air Line Co. vs. Horton,*

233 U. S. 492.

*Erie Railway Company vs. Winfield,*

244 U. S. 170.

*New York Central Ry. Co. vs. Winfield,*

244 U. S. 147.

*New York Central Ry. Co. vs. Tonscillito,*  
244 U. S. 316.

The State of Iowa has legislated as to the remedy to be given for an injury occurring in intrastate commerce and has created a tribunal for enforcing such remedy. That tribunal is the Industrial Commissioner, subject to review by the courts. The Commissioner has, under the specific terms of the act creating his office, jurisdiction only in cases occurring in intrastate commerce.

On the other hand, the federal government has, by the Federal Employers' Liability Act, legislated as to the remedy for an injury occurring in interstate commerce, and while not creating a new tribunal for the enforcement of rights under that act, it in effect has done so by utilizing the courts of the state and federal governments already in existence. These tribunals have jurisdiction (as to accidents occurring in Iowa) only of accidents in interstate commerce.

In order that either tribunal may exercise jurisdiction, it must find the jurisdictional facts as to the character of the commerce. It is fundamental that any tribunal has and must have jurisdiction to determine the facts on which its own jurisdiction depends. The Iowa tribunal, therefore, has and must have jurisdiction to determine whether the commerce is interstate or intrastate. If it finds interstate commerce, it lacks jurisdiction. If it finds intrastate commerce, it has jurisdiction.

Conversely as to Iowa accidents (and this plaintiff concedes), the tribunals for enforcing the Federal Act likewise have and must have authority to determine whether the commerce was intrastate or interstate, a determination of such fact being necessary to the determination of its own jurisdiction. If it finds the commerce to be intrastate, it is ousted of jurisdiction.

against the plaintiff's contention. This ruling the District Court of Lucas County affirmed.

The barrier which the 'Supreme Court of Minnesota does not attempt to and of course could not get over is that the proposition was squarely presented to the Iowa court and that the Iowa court and Commissioner did determine that in this particular case it was not required to await the decision of the Minnesota court. In other words, the situation is that the Iowa court differed from the Minnesota Supreme Court upon the effect of beginning an action in the Minnesota court. If the Minnesota Supreme Court is right, it merely means that the Iowa court was wrong, and if the Iowa court was wrong the way to correct the error was to appeal, and not by collateral attack upon its judgment. Thus, in

23 *Cyc.* 1088

it is stated:

"Where the court judicially construes and adjudicates the question of its jurisdiction and decides that the facts exist which are necessary to give it jurisdiction of the case, the finding is conclusive and cannot be controverted in a collateral proceeding."

See also 34 *Corpus Juris* 552 and cases cited.

In *Taylor vs. Robert Ramsey Co.*, 114 Atl. 830, the Supreme Court of Maryland held that the jurisdiction of the State Industrial Commission to make an award under the Compensation Act, was not open to collateral attack. The Industrial Commission had awarded compensation to a man engaged in a maritime occupation. This court thereafter in another case held that a state could not include men employed in maritime occupations within its compensation act.

*Southern Pac. Co. vs. Jensen*,

244 U. S. 205.

Therefore though the Industrial Commission was

clearly wrong, nevertheless it was held that the award under the compensation act was valid.

The only way to correct an error in the conclusion of the Iowa court having jurisdiction, is by direct appeal.

*Toy Toy vs. Hopkins,*  
212 U. S. 542,

where this court held (syllabus) :

"Even though the Circuit Court erroneously retains jurisdiction of a criminal case against an allottee Indian, *its judgment is not void but should be corrected on appeal or by writ of error and cannot be attacked in habeas corpus proceedings.*"

Likewise in the case of *Dowell vs. Applegate*, 152 U. S. 327, this court said, on page 340 :

"These authorities above cited, it is said, do not meet the present case, because the ground on which it is claimed the Federal Court assumed jurisdiction was insufficient in law to make this case one arising under the laws of the United States. But that was a question which the Circuit Court of the United States was competent to determine in the first instance. Its determination of it was the exercise of jurisdiction. *Even if that court erred in entertaining jurisdiction, its determination of that matter was conclusive upon the parties before it, and could not be questioned by them or either of them collaterally, or otherwise than on writ of error or appeal to this court.*"



## II.

## IDENTITY OF PARTIES.

In addition to the rule already referred to, that a judgment is also binding upon the parties to an action, there is the further rule that a judgment is also binding upon those in privity with the parties. The question presented is:

Is there such privity between Mrs. Hope and the plaintiff (the administrator) that a judgment to which Mrs. Hope is a party, binds the administrator? The court below held that there was no such privity.

The case of *Williams vs. Southern Pacific Ry.* 202 Pac. 356, 54 Cal. App. 571, to which reference has been made, on exactly identical facts, holds that there was privity and that the administrator was bound. Nothing could be added to the reasoning in that case. The Circuit Court of Appeals, in *Dennison vs. Payne*, 293 Fed. 333, reached an opposite conclusion. With all respect for that tribunal, it is submitted that the decision is poorly reasoned, and not in accord with the decisions of this court.

By the judgment of the District Court of Iowa, it was adjudged that Hope was engaged in intrastate commerce. Jessie Hope, the widow, was a party to that action. In this action it was contended by plaintiff and decided by the court below, that Hope was engaged in interstate commerce. This action is brought by the administrator under the Federal Employers' Liability Act, which provides that the action may be maintained by the personal representative "for the benefit of the surviving widow." In this case the widow is the sole beneficiary and is entitled to any recovery in this action. There are no dependent children, it being stipulated upon the trial that the stepchildren mentioned in the complaint were not entitled in fact to any recovery in this action. (R. 72.)

Neither the representative, the plaintiff in this action, nor the estate, has any interest in the cause of action or the recovery. This, as indicated, belongs solely to the widow, the representative being merely the trustee for the purpose of bringing suit.

*Gulf Ry. Co. vs. McGinnis,*  
228 U. S. 173.

In the Iowa action, Mrs. Hope was the real party in interest as well as the nominal party;; in the Minnesota action she is the real party in interest, but not the nominal party.

The view of this court on the question of a privity existing between the widow as beneficiary, and the administrator is clearly shown by the case of *M. K. & T. Ry. Co. vs. Wulf*, 226 U. S. 570. A widow brought the suit, alleging a cause of action under the Federal Employers' Liability Act. Of course under that act she technically had no authority to sue. In the meantime, the statute of limitations ran. An application was then made to substitute the administrator as plaintiff. This was permitted, this court holding that no new cause of action was introduced in the case, saying:

"Nor do we think it was equivalent to the commencement of a new action so as to render it subject to the two years limitation prescribed by Section 6, of the Employers' Liability Act. *The change was in form rather than in substance.*"

In the case of *Lathrop vs. Schutte*, 61 Minn. 196, 63 N. W. 493, the court in speaking of an action brought by the father under the statute, for injuries to the minor child, said:

"Whatever is recovered, if anything, belongs to the child, and the father holds it in trust for him. \* \* \* The judgment in this action by the parent is a bar to any subsequent action for the same cause prosecuted

*by the minor, by his guardian, general or ad litem, or by himself, when he reaches majority."*

In the case of *Bamka vs. Omaha Ry.*, 61 Minn. 549, 63 N. W. 1116, the court said:

"For in an action brought by a person as an administrator or as a guardian, general or special, *he is not a party properly speaking, although he is nominally. The real party is the estate he may represent as administrator or the minor in whose behalf he, as guardian, prosecutes the action.*"

In *Telford vs. McGillis*, 130 Minn. 397, 153 N. W. 758, the court said:

"It does not matter that intervenor was not a formal party to this action. *It was brought in the name of his representative, and this concludes him.*"

In *Corcoran vs. Chesapeake & Ohio Ry.*, 94 U. S. 741, Corcoran was trustee for the bondholders. As such trustee he brought suit, but was defeated. Later he brought a second suit as a bondholder. It was held that the judgment against him as trustee bound him individually because, as trustee, he represented himself individually.

In the case of *In re Bell (Cal.)*, 153 Cal. 331, 95 Pac. 372, the court said:

"A judgment denying the right of a widow to any credit for family allowances rendered in proceedings for the settlement of her account as administratrix is conclusive on her right to a family allowance in a subsequent proceeding therefor, instituted by her individually, *she being, in both proceedings, the real party in interest, asserting individually and not representative rights.*"

In the case of *In re Parks*, 166 Ia. 403, 147 N. W. 850, the court said:

"It may be conceded that theoretically the former suit against Mrs. Parks individually was not against the same defendant as is the present suit against her as administratrix of an estate. Under the facts of this case, however, *such theoretical distinction loses its ap-*

*plication and is without practical value to the appellant.* \* \* \* \* If there were any persons beneficially interested in such an estate other than herself individually, a somewhat different question would be presented. But there are none. \* \* \* \* Mrs. Parks, as administratrix, therefore, is representative of no other beneficiary than herself as sole heir of the decedent."

In the case of *Chandler vs. White Oak Creek Lumber Co.* (Tenn.) 173 W. 449, Chandler held certain land as trustee for himself and others. Suit was brought against him individually (not as trustee), and against all other beneficiaries of the trust, to quiet title. Judgment was obtained. Later, as trustee, he brought suit to recover possession of this land. It was held that he, as trustee, was estopped by this judgment against the beneficiaries of the trust. This is exactly the situation here.

In 23 *Cyc.* page 1245, the rule is stated as follows:

"Although one is not nominally or formally a party to an action, he will be concluded by the judgment therein if he was represented, as to his rights or interests in the subject matter, by a party legally entitled to represent him, or who actually conducted the prosecution or defense on the behalf and for the benefit of such person."

In support of this rule (see Note 32), there are cited cases from the Supreme Courts of sixteen states, as well as the courts of the United States and Canada.

See also 34 *Corpus Juris* 999 and cases cited.

In *Black on Judgments*, 2nd Edition, Section 538, it is stated:

"Where a suit is prosecuted by one person for the use of another, the latter being the equitable owner of the claim and the real party in interest, a judgment will bar a second suit by the latter."

In *Jackson vs. Industrial Board*, 280 Ill. 526, 117 N. E. 705, the court said:

"It is argued by the plaintiff in error that *notwithstanding the fact that the Circuit Court by its judgment on the demurrer determined that the deceased was not engaged in interstate commerce*, and for that reason gave judgment on demurrer, the judgment of the court in that case does not estop plaintiff in error to contend in this proceeding that the deceased was in fact engaged in interstate commerce. *The court by its judgment in that case determined one question of fact that necessarily defeated the administratrix in that suit, i. e., that the deceased was not engaged in interstate commerce, and for that reason she could not maintain her suit under the Federal Employers' Liability Act. That judgment completely estops plaintiff in error as well as the administratrix from contending in any other suit between the same parties that the deceased was injured while employed by plaintiff in error, in interstate commerce.*"

In *Grant vs. Winona Ry. Company*, 85 Minn., 422, 89 N. W. 60, the court held that Railway bondholders were in privity with the Trustee under the mortgage. The court said:

"In such an action it is neither necessary nor proper to make the bondholders parties, for, as to the trust property, the trustee who holds the legal title thereof is unquestionably their representative, and they will (there being no fraud or collusion) be bound by the result of any action touching the trust property to which the trustee is a party."

In the case of *Connolly vs. Connolly*, 26 Minn. 350, the court held that the heirs of an estate were in privity with the administrator, saying:

"We have no doubt that the administrator had authority to enforce the cause of action against the Connollys. Acting as administrator in enforcing the same, he acted for the estate, and *the estate and all persons interested in it were therefore bound by the judgment which he recovered.*"

See also

- Parsons vs. Urie*,  
104 Maryland 238, 64 Atl. 927.  
*Rowell vs. Smith*,  
123 Wis. 510, 102 N. W. 1.  
*Black on Judgments*,  
2nd Ed., Sec. 537.

The court below relied on the *Dennison* case in reaching its conclusion, merely citing the case *Troxell vs. Delaware & Lackawanna Railway Company*, 227 U. S. 434 and saying that:

"The circumstances were different but the rule as to the necessity of identity of parties was stated there."

The *Dennison* case is based wholly on the *Troxell* case and wholly ignores the *Williams* case. The *Williams* case so clearly distinguishes the *Troxell* case as to leave nothing to be said.

When it is borne in mind just what the *Troxell* case decided it is apparent that the case is not an authority upon this proposition at all.

The *Troxell* case had a long history. Mrs. Troxell brought suit as widow for the death of her husband under the Pennsylvania, "death-by-wrongful-act statute."

Two grounds of negligence were alleged:

- (1.) Defective Instrumentality.
- (2.) Negligence of a fellow-servant.

The State of Pennsylvania had not abolished the fellow-servant doctrine. At the trial therefor, Mrs. Troxell had to and did expressly abandon the negligence of a fellow-servant as a ground of recovery.

She recovered a verdict based on the defective instrumentality. A motion for judgment, notwithstanding the verdict was denied. (180 Federal 871.)

Upon writ of error the Circuit Court of Appeals of the Third Circuit held that there was no evidence of a defective instrumentality. It therefore reversed the judgment

and since it had held that there was no evidence upon the only ground of negligence claimed, it granted judgment notwithstanding the verdict. (183 Federal 373.)

This was before the decision in *Slocum vs. New York Life Insurance Company*, 228 U. S. 364, which held that judgment notwithstanding the verdict could not be granted by a Federal Court.

Judgment was entered on the merits in the District Court pursuant to the decision of the Circuit Court of Appeals.

Mrs. Troxel was then appointed Administrator of her husband's estate and brought a new suit under the Federal Employers' Liability Act. This time she alleged as a ground of negligence the act of a fellow-servant, the fellow-servant doctrine having, of course, been abolished by that act. She obtained as Administrator, a recovery on that ground alone, which on writ of error was by the Circuit Court of Appeals, reversed on the ground of *res judicata* under the first judgment (200 Federal 44.)

This court reversed the Circuit Court of Appeals, (227 U. S. 434), holding that the first judgment did not bar the second suit. This court mentioned the distinction between estoppel by judgment or *res judicata* in its broadest sense, and estoppel by verdict, using the language which has already been quoted on page 19 of this brief.

This court also stated:

"To work an estoppel the first proceeding and judgment must be a bar to the second one because it is a matter already adjudicated between the parties. The cause of action under the state law, if it could be prosecuted to recover for the wrongful death alleged in this case, was based upon a different theory of the right to recover than prevails under the Federal statute. Under the Pennsylvania law there could be no recovery for the negligence of the fellow-servants of the deceased. This was the issue upon which the case was

submitted at the second trial and a recovery had. Whether the plaintiff could recover under the Pennsylvania statute was not involved in the second action, and the plaintiff's right to recover because of the injury occasioned by the negligence of the fellow-servants was not involved in or concluded by the first suit."

This court held that all that was actually decided in the first suit was that there was no defective instrumentality, but in the first suit there was no decision on the question of negligence of a fellow-servant.

The verdict in the second case was based solely upon the fellow-servant negligence and not in any way upon a defective instrumentality, therefore, there was no issue involved in the second suit which was decided in the first suit.

The first suit arose under the Pennsylvania act. The second suit arose under the Federal Employers' Liability Act. Therefore, the causes of action were not the same. Therefore, the rule as to estoppel by verdict rather than estoppel by judgment applied and since estoppel by verdict requires that the particular matter be determined in the first suit, to be a bar to the second and since no fact in the second suit was actually determined in the first there was no estoppel by verdict, and therefore no estoppel at all.

*The same result would have been reached, had the administrator been the party in both actions.*

The court did discuss the question of the privity between the widow as Trustee under the Pennsylvania act and the Administrator as Trustee under the Federal Employers' Liability Act, although this was unnecessary to the decision.

A holding that no cause of action exists under the state law certainly does not adjudicate that no cause of action exists under the Federal law. This would be true even though there were the same plaintiff in each case,



nominally; but if there had been a recovery by the widow under the state law, could there be any doubt that this precluded an additional recovery by the administrator under the Federal law? Any other rule would permit of two recoveries; one by the widow under the state law and one by the administrator for the widow under the Federal law. The widow could prove intrastate commerce in one jurisdiction and then the administrator in a second action could attempt to prove what was adjudicated in the other action not to be true, and, by entirely different evidence, perhaps obtain another recovery. Such is certainly not the law where the recovery in either event goes to the same person.

In the court below counsel relied on the case of *Ingersoll vs. Coram*, 211 U. S. 335. This case merely holds that an administrator appointed by the courts of one state is not in privity with an ancillary administrator in the same state appointed by the courts of another state. In that case this court rather intimated that its conclusion was somewhat doubtful, and that it would not so decide were the question a new one; but it adhered to a doctrine which it had already announced in prior decisions.

It should likewise be noted that in the *Ingersoll* case the first judgment which was relied on as an estoppel was a judgment permitting no recovery. This court certainly never intended to lay down a rule which would permit two different recoveries by separate administrators upon the same identical cause of action. If this is what the *Ingersoll* case means, then by the simple expedient of having a different administrator appointed in each state, there can be forty-eight recoveries for every death case under the Federal Employers' Liability Act.

There is certainly nothing in the opinion in the *Troxell* case which suggests that this court intended to depart from

the well established doctrine announced in the *Corcoran* case, (94 U. S. 741), already referred to where this court held that a Trustee and a cestui que trust were in privity, and said:

"It would be a new and very dangerous doctrine in the equity practice to hold that the cestui que trust is not bound by the decree against his trustee *in the very matter of the trust for which he was appointed.*"

While of course we recognize that a California decision is not a precedent binding upon this court, because of the clear and satisfactory reasoning in the case of *Williams vs. Southern Pacific*, *supra*, we have attached a copy of that decision as an appendix.

The court below was clearly wrong in the determination of a Federal question arising under the Constitution of the United States. The judgment should therefore be reversed.

Respectfully submitted,

M. L. BELL,

New York, New York.

W. F. DICKINSON,

DANIEL TAYLOR,

Chicago, Illinois.

THOMAS D. O'BRIEN,

ALEXANDER E. HORN,

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St. Paul, Minnesota,

Counsel for Petitioner.

and that the parties to the two proceedings are not identical, in that the plaintiff sued as an individual in the one and as administratrix in the other.

In *Western Metal Supply Co. vs. Pillsbury*, 172 Cal. 411, 156 Pac. 491, Ann. Cas. 1917 E, 390, it is said:

"Where compensation is sought the proceedings are in substance those of a court in an action at law. \* \* \* After hearing by the Commission, it makes and files its findings of fact and its 'award which shall state its determination as to the rights of the parties.' \* \* \* The findings thus made are 'conclusive and final' \* \* \* and the award itself is not reviewable except by a writ of certiorari under which the review is restricted in scope. \* \* \* Any party in interest may file a certified copy of the findings and award with the clerk of the superior court, and judgment must be entered by the clerk in conformity therewith. \* \* \* We shall not take the time to review in detail the cases just cited, but content ourselves with saying that we think there is nothing in them which would support the claim that the powers exercised by the Industrial Accident Commission of this state in making awards of compensation are not strictly judicial."

See also, *Carstens vs. Pillsbury*, 172 Cal. 576, 158 Pac. 218; *Pacific Coast Casualty Co. vs. Pillsbury*, 171 Cal. 319, 153 Pac. 24; *Gouanillou vs. Industrial Accident Commission* (Sup.) 193 Pac. 937; *Massachusetts, etc., Co. vs. Industrial Accident Commission*, 176 Cal. 491, 168 Pac. 1050.

The findings of the Industrial Accident Commission are *res adjudicata*. In *re Hunnewell*, 220 Mass. 351, 107 N. E. 934; *Centralia Coal Co. vs. Industrial Accident Commission*, 297 Ill. 513, 130 N. E. 727.

(1) It is not claimed that either the action in the superior court or the proceeding before the Commission could have been successfully pleaded in abatement of the prosecution of the other, but respondent cites 15 *Corpus Juris*, 1161, to the effect that—

"Where two tribunals have concurrent jurisdiction over the same parties and subject-matter, the tribunal where jurisdiction first attaches retains it exclusively, and will be left to determine the controversy and to fully perform and exhaust its jurisdiction and to decide every issue or question properly arising in the case."

At page 1165 of the same volume, however, it is stated that—

"The rule is limited to actions which deal either actually or potentially with specific property or objects, and where a suit is strictly *in personam*, nothing more than a personal judgment being sought, there is no objection to a subsequent action in another jurisdiction."

There is some confusion in the decisions because of failure to recognize the limitation just stated. In strictly personal actions the great weight of authority sustains the rule as stated in the case of *Boatmen's Bank vs. Fritzlen*, 135 Fed. 667, 68 C. C. A. 288, that—

"It is not the final judgment in the first suit, but the first final judgment, although it may be in the second suit, and renders the issues in such a case *res adjudicata* in the other court."

For further authorities to the same effect, see *Insurance Co. vs. Harris*, 97 U. S. 331, 24 L. Ed. 959; *Schuler vs. Israel*, 120 U. S. 506, 7 Sup. Ct. 648, 30 L. Ed. 707; 1 Freeman on Judgments (4th Ed.) § 320; *Jones vs. Jones*, 108 N. Y. 415, 15 N. E. 707, 2 Am. St. Rep. 447; *Lancashire Ins. Co. vs. Corbetts*, 165 Ill. 592, 46 N. E. 631, 36 L. R. A. 640, 56 Am. St. Rep. 280; *Davis vs. Bedsole*, 69 Ala. 362; *Bourgeois vs. Jackobs*, 45 La. Ann. 1310, 14 South. 68; *Oxford vs. Paris*, 33 Me. 179; *Bank of U. S. vs. Merchants' Bank*, 7 Gill (Md.) 415; *Marble vs. Keyes*, 9 Gray (Mass.) 221; *Allis vs. Davidson*, 23 Minn. 442; *Nave vs. Adams*, 107 Mo. 414, 17 S. W.

958, 28 Am. St. Rep. 421; *Casebeer vs. Mowry*, 55 Pa. 419, 93 Am. Dec. 766.

(2) The plaintiffs in the two proceedings are not the same, and therefore the award of the Commission is not a bar to the whole cause of action in the superior court. *Troxell vs. Delaware, L. & W. R. Co.*, 227 U. S. 434, 33 Sup. Ct. 274, 57 L. Ed. 586.

“A judgment obtained by one or more of several joint owners or creditors, having claims against a common debtor, is not a bar to a subsequent action by the other claimants, or separate suits by each of them, for the recovery of their claims, although it is *res adjudicata* as to the claims of those who brought the former suit.” 15 Standard Encyc. of Prac. 514; *Suisun L. Co. vs. Fairfield School District*, 19 Cal. App. 594, 127 Pac. 349; *Harris vs. Alcock*, 10 Gill & J. (Md.) 226, 32 Am. Dec. 158.

(3) A material issue in both proceedings was the character of Williams' employment; if intrastate, the Commission had exclusive jurisdiction to award compensation; if interstate, then the jurisdiction was in the superior court. The Commission determined that the employment was in intrastate commerce, and the fact—

“so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified. This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for the aid of judicial tribunals would not be invoked for the vindication of rights of persons and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them.” *Southern Pacific*

*R. Co. vs. United States*, 168 U. S. 1, 18 Sup Ct. 18, 42 L. Ed. 335; 2 Black on Judgments (2d Ed.) § 506.

In *Spokane & Inland Empire R. Co. vs. Whitley*, 237 U. S. 487, 35 Sup. Ct. 655, 59 L. Ed. 1060, L. R. A. 1915 F, 736, in construing a statute of Idaho similar to the Federal Employers' Liability Act, the court said:

"The recovery authorized is not for the benefit of the 'estate' of the decedent; the proceeds of the recovery are not assets of the estate. Where the personal representative is entitled to sue, it is only as trustee for described persons, the 'heirs' of the decedent. \* \* \* They are the sole beneficiaries. \* \* \* It may also be premised that, when suit is duly brought by the trustee under such a statutory trust, it is a necessary and conclusive presumption that the trust will be executed and the rights of the beneficiaries as fixed by the statute which created the obligation will be recognized by all courts before whom the question of distribution may come."

In *Ruiz vs. Santa Barbara Gas etc., Co.*, 164 Cal, 191, 128 Pac. 332, it is said:

"It is settled by the decisions Sections 377 of the Code of Civil Procedure is one solely for the benefit of the heirs, \* \* \* that the money recovered in such an action does not belong to the estate but to the heirs only, and that an administrator has the right to bring the action only because the statute authorizes him to do so, and that he is simply made a statutory trustee to recover damages for the benefit of the heirs."

In *Corcoran vs. Chesapeake & O. Canal Co.*, 94 U. S. 741, 24 L. Ed. 190, the plaintiff brought the suit upon certain bonds and the defendant pleaded a prior judgment as a bar. The court, in sustaining the plea, said:

"It is also argued that in that suit Corcoran was only a party in his representative capacity of trustee, and he here sues in his individual character as owner of the bonds, \* \* \* and in this latter capacity is not bound by that decree. But why is he not bound? It

was his duty as trustee to represent and protect the holders of these bonds; and for that reason he was made a party, and he faithfully discharged that duty. It would be a new and very dangerous doctrine in the equity practice to hold that the *cestui que trust* is not bound by the decree against his trustee in the very matter of the trust for which he was appointed. If Corcoran owned any of these bonds and coupons then, he is bound, because he was representing himself. If he has bought them since, he is bound as a privy to the person who was represented."

In *Estate of Bell*, 153 Cal. 331, 95 Pac. 372, the court arrived at a similar conclusion where the administratrix had proceeded in her representative capacity in one case and in her individual capacity in the other. The court said:

"In both proceedings she was the real party in interest, asserting individual and not representative rights, and is bound by the judgment."

See also, *In re Parks' Estate*, 166 Iowa, 403, 147 N. W. 850; *Chadler vs. White Oak Creek Lumber Co.*, 131 Tenn. 47, 173 S. W. 449.

In 2 Black on Judgments (2d Ed. § 536, it is said:

"If one sues as trustee, and afterwards in his individual capacity, in respect of the same subject-matter, he is bound by the decree in the former suit. For if, at that time, he owned the subject of the trust, he was representing himself."

(4) Without multiplying authorities, it may be stated as a general rule that, where one appears in a representative capacity in one action and in his individual capacity in another action, involving the same subject-matter, without any change in his relation to that subject-matter, a judgment in one case is conclusive of his rights in the other.

Counsel for respondent contends that the rule as thus stated is in conflict with that laid down in the case of *Troxell vs. Delaware, Y. & W. R. Co.*, 227 U. S. 434, 33 Sup. Ct. 274, 57 L. Ed. 586. The judgment pleaded as a bar in that case was given in an action by Mrs. Troxell as surviving widow in behalf of herself and children for the death of her husband. The court in that action held that it was brought under the state law.

"In such an action there could be no recovery because of the negligence of the fellow workman of Troxell. The jury was confined to the question of responsibility for failing to provide proper safety appliances."

The plaintiff was given judgment, which was reversed on appeal. The second action was then brought by Mrs. Troxell, as administratrix, under the federal act, under which there might be a recovery for the negligence of fellow workmen. In the second action the trial court held that—

"The former case had adjudicated matters as to defects in cars, engines and rails (and) submitted to the jury only the question of the negligence of fellow-servants."

Judgment was again rendered in favor of the plaintiff, and the Circuit Court of Appeals "reversed the judgment, holding that the first proceeding and judgment was a bar to recovery in the second action." In overruling the decision of the Circuit Court of Appeals, the Supreme Court held that—

"Where the second suit is upon a different claim or demand, the prior judgment operates as an estoppel only as to matters in issue or points controverted and actually determined in the original suit. \* \* \* And the plaintiff's right to recover because of the injury occasioned by the negligence of the fellow-servants was not involved in or concluded by the first suit."

The court further held that—



"There was not that identity of parties in the former action by the widow and the present case, properly brought by the administratrix under the Employers' Liability Act, which renders the former suit and judgment a bar to the present action."

(5) Appellant urges that this latter statement by the court is mere dictum, but—

"Where there are two grounds, upon either of which the judgment of the trial court can be rested, and the appellate court sustains both, the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other." *Union P. R. Co. vs. Mason City & Ft. D. R. Co.*, 199 U. S. 160, 26 Sup. Ct. 19, 50 L. Ed. 134."

The decision goes no further than to hold that, because there was not identity of parties plaintiff in the two actions, the second was not wholly barred by the judgment in the first. The question whether an issue actually determined in the first was conclusive on the same issue in the second as against a recovery for the benefit of Mrs. Troxell was not before the court. The trial court held that the judgment in the first action was a bar as to all issues actually determined in that suit. The correctness of this holding was not in controversy before the higher court, and was not considered by it. The opinion in the *Troxell* case does not warrant the conclusion that the court intended thereby to overrule its prior decision in the *Corcoran* case, supra, and similar decisions by the highest courts of many of the states.

(6) In the proceeding before the Commission of Mrs. Williams, she appeared in her individual capacity, and in the action in the superior court she represented herself as one of the beneficiaries, and had control of the prosecution of the case.

"Parties, in the larger legal sense, are all persons having a right to control the proceedings, to make de-

fense, to adduce and cross-examine witnesses, and to appeal from the decision, if an appeal lies." *Green vs. Bogue*, 158 U. S. 478, 15 Sup. Ct. 975, 39 L. Ed. 1070."

Having recovered judgment for compensation in the proceeding before the commission by establishing the fact that the deceased was employed in intrastate commerce, and that judgment having become final, she could not recover in the action in the superior court by disproving the same fact on which the first judgment was necessarily based.

Not knowing what the determination of the trial court would be as to the character of employment of the deceased, and naturally desirous of avoiding an entire failure of compensation, the plaintiff felt the necessity of making the application to the Commission, even though recovery in that tribunal is limited in amount. In states which provide but one tribunal for the trial of such actions, that tribunal determines in the one action whether the employment was interstate or intrastate, and renders judgment accordingly under the federal act or the state law as the case may warrant, and the predicament in which the plaintiff herein found herself cannot arise.

The judgment was for \$25,000, of which \$5,000 was apportioned to Vivian Peabody, an adult married daughter of the deceased. The complaint alleges that she was not dependent upon the deceased. Not being dependent, she was not entitled to compensation under the state law, and she was not a party to the proceeding before the Commission. It is clear that the award of the Commission is not a bar to a recovery in her behalf under the federal act, nor is any fact found by the Commission *res adjudicata* as to her. \* \* \*

The judgment appealed from is reversed.

We concur: BURNETT, J.; HART, J.



ADJUSTED TO MERITS

DEC 14 1925

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WM. R. STANS

**No 683**

IN THE  
**Supreme Court of the United States**

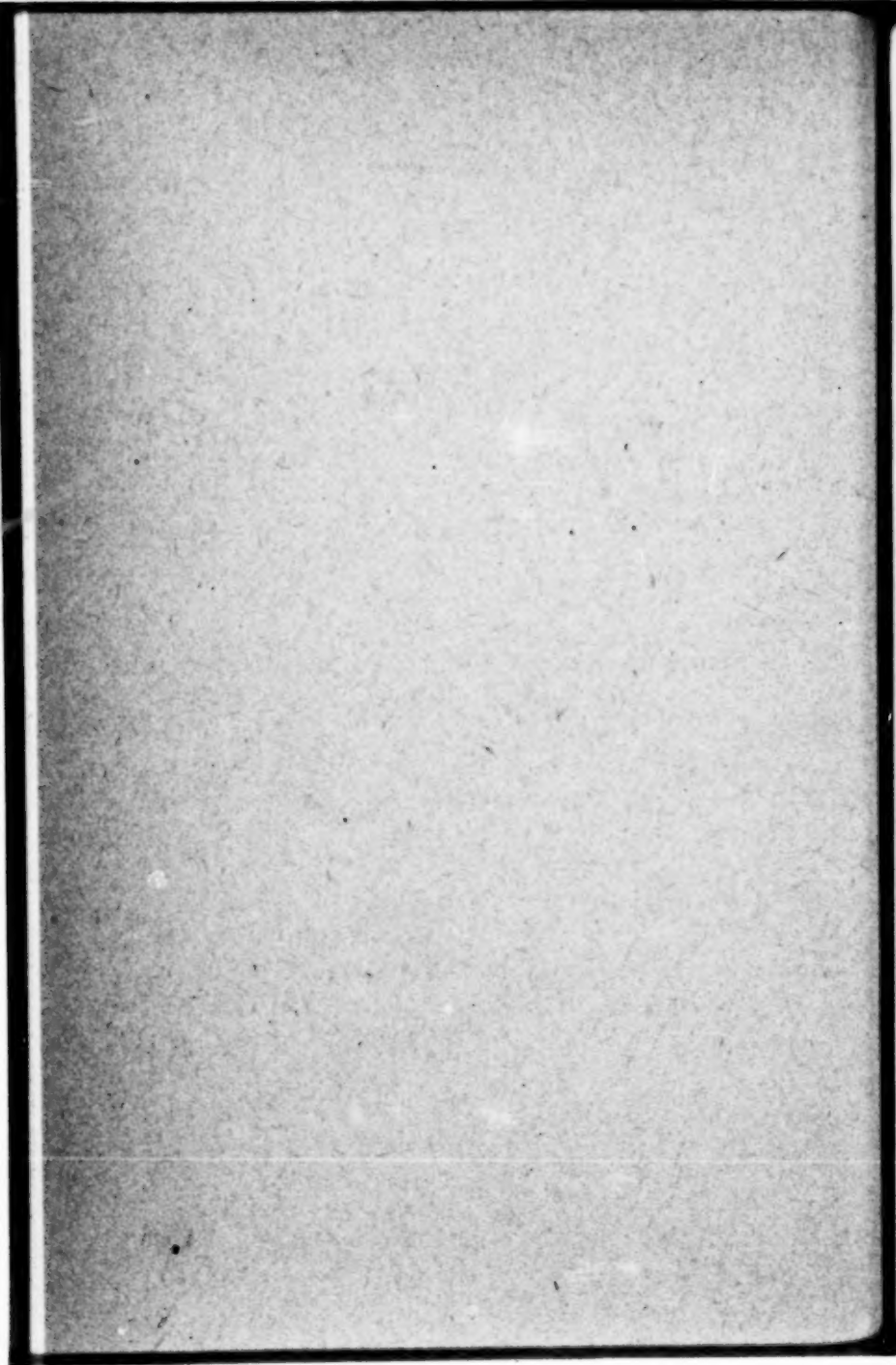
CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,  
*Petitioner,*

*vs.*

A. D. SCHENDEL, AS SPECIAL ADMINISTRATOR OF THE ESTATE  
OF CLARENCE Y. HOPE, DECEASED, *Respondent.*

MOTION OF RESPONDENT TO DISMISS, AFFIRM,  
OR TRANSFER FOR HEARING TO THE  
SUMMARY DOCKET AND BRIEF  
IN SUPPORT THEREOF.

TOM DAVIS AND ERNEST A. MICHEL,  
*Attorneys for Respondent,*  
*Minneapolis, Minnesota.*



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3rd: That the judgment of the Supreme Court of Minnesota be affirmed on the ground that the petition for writ of certiorari herein was sought for purposes of delay only.

4th: In case none of the above motions be granted, then the respondent moves the court that this action be transferred for hearing to the summary docket because the case is of such a character as not to justify extended argument.

TOM DAVIS AND ERNEST A. MICHEL,  
*Attorneys of Record for Respondent,*  
*Minneapolis, Minnesota.*

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IN THE  
 UNITED STATES SUPREME COURT

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CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,  
*Petitioner,*

*vs.*

A. D. SCHENDEL, AS SPECIAL ADMINISTRATOR OF THE ESTATE  
 OF CLARENCE Y. HOPE, DECEASED, *Respondent.*

---

NOTICE OF MOTION.

The petitioner is hereby notified that respondent will, on the 16th day of November, A. D. 1925, on the convening of the Supreme Court of the United States on that day, or as soon thereafter as a hearing may be had, submit for the consideration of said court the foregoing and annexed motions, and each of them, and the brief in support thereof, hereto attached, all of which are now and herewith served upon you.

TOM DAVIS AND ERNEST A. MICHEL,  
*Attorneys for Respondent,*  
*Minneapolis, Minnesota.*

Received a copy of the foregoing notice and the brief thereto attached, by personal service thereof, this..3...day of...*November*..... 1925.

.....*Abner Horn & Steiger*  
Attorneys for Petitioner.

### STATEMENT OF FACTS.

This action was tried in the District Court of Steele County, Minnesota, and resulted in a verdict in favor of the plaintiff. The action was one to recover damages for the death of Clarence Y. Hope. The case was founded on the Federal Employers' Liability Law. There was a verdict for plaintiff which was approved by the trial court and later judgment was entered on the verdict and this judgment was approved by the Supreme Court of the State of Minnesota.

### ARGUMENT.

A writ of certiorari was granted to review the judgment herein. It was claimed by the railway company that a judgment was entered "In the matter of the award of compensation on account of the death of C. Y. Hope, deceased; *Mrs. C. Y. Hope, Appellant, v. Chicago, Rock Island & Pacific Railway Company, Appellee,*" and that this judgment was entered in the State of Iowa, affirming the action of the Iowa Compensation Board and that it constituted a bar to the maintenance of this action.

The Minnesota Supreme Court held that the judgment was not a bar because there was no identity of parties.

The Minnesota Supreme Court further held that the plaintiff proceeding under the Federal Act, could not be deprived of his right to prosecute his action in a court as



existing *at common law*, by the action of a railway company in starting proceedings before a compensation board, after plaintiff had started his action under the Federal statute.

PLAINTIFF'S ACTION IN MINNESOTA WAS COMMENCED BEFORE THE RAILWAY COMPANY STARTED ITS PROCEEDING BEFORE THE IOWA COMPENSATION BOARD.

*Both Minnesota Courts held decedent was engaged in interstate commerce.*

The Minnesota Court held that within the reasoning of such cases as *Troxell v. Delaware, L. & W. R. Co.*, 227 U. S. 434, 57 L. Ed. 586, there was *no identity of parties* in the action before the Compensation Board in Iowa and the action by the administrator in the District Court of Minnesota, under the Federal Act.

#### THE FEDERAL ACT SUPREME.

The cases in this Court are unanimous in holding that the Federal Act is supreme in its sphere and *cannot be interfered with by any State act or proceeding*. Therefore, the act of the Iowa Commission could not interfere with the recognized Federal right of plaintiff in the Minnesota Court.

The Federal right being supreme, and there being no identity of parties in the two actions, we submit to this Court that the writ herein was improvidently granted and that it should now be dismissed. If the dismissal be not granted, we submit to the Court that, under the unanimous holdings of this Court, relative to the supremacy of the Federal statute, the judgment of the Minnesota Court should be affirmed.

IF MOTION TO DISMISS OR AFFIRM BE DENIED,  
THE CAUSE SHOULD BE ADVANCED FOR HEAR-  
ING TO THE SUMMARY DOCKET.

Decedent was injured on the 4th day of February, 1923, his death resulting some days thereafter. It is now October, 1925, and plaintiff's rights (respondent here) are still undetermined.

We believe it is manifest that under the decisions of the Supreme Court of the United States this cause must of necessity be determined in favor of respondent and that, in view of the many cases of this Court upholding the Federal statute, it cannot be held other than that the Federal Act is supreme and supersedes all State laws.

With all due respect to counsel for petitioner, we suggest that the petition for writ of certiorari herein was filed for purposes of delay.

The case at bar involves no great legal principle.

It involves no question of construction of a Federal statute nor any grave constitutional question or legal principle.

The decision of the case can be of little importance to anyone save to the railway company and the surviving widow of decedent.

The issues in the case are very simple. They can be adequately presented to the Court within the time allotted for presenting causes on the summary docket. The avoidance of the law's delay demands that there be a speedy hearing and a termination of this cause.

The questions involved are of such a nature that respondent prays, if said writ be not dismissed as prayed for, that the court place the cause on the summary docket for

hearing, as provided by the rules of this Honorable Court.

Dated at Minneapolis, Minnesota, October 31st, 1925.

Respectfully submitted,

TOM DAVIS AND ERNEST A. MICHEL,

*Attorneys for Respondent,*

*Minneapolis, Minnesota.*

FEB 20 1926

WM. R. STANSBURY  
CLERK

(31,406)

IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1925.

No. 683.

CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,  
*Petitioner,*

*vs.*

A. D. SCHENDEL, AS SPECIAL ADMINISTRATOR OF THE ESTATE  
OF CLARENCE Y. HOPE, DECEASED, *Respondent.*

**RESPONDENT'S BRIEF.**

TOM DAVIS AND ERNEST A. MICHEL,  
*Attorneys for Respondent,*  
419 Metropolitan Bank Bldg.,  
Minneapolis, Minnesota.

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(31,406)  
IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1925.  
No. 683.

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CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY,  
*Petitioner,*

*vs.*

A. D. SCHENDEL, AS SPECIAL ADMINISTRATOR OF THE ESTATE  
OF CLARENCE Y. HOPE, DECEASED, *Respondent.*

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**RESPONDENT'S BRIEF.**

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**STATEMENT OF THE CASE.**

This case comes here on a writ of certiorari to review a judgment of the Supreme Court of the State of Minnesota, which affirmed a judgment of the District Court of Steele County, Minnesota.

**STATEMENT OF FACTS.**

Clarence Y. Hope was employed as a railway conductor for the Chicago, Rock Island & Pacific Railway Company. While so employed, he was killed under circumstances creating a liability on the part of the railway company.



It was conceded that the railway company was guilty of negligence, which negligence was a proximate contributing cause of the death of Clarence Y. Hope.

#### INTERSTATE COMMERCE.

(Figures in parentheses refer to Record folios.)

Hope and the crew of which he was a member were working near a station known as Williamson, in the State of Iowa. There are certain mines located near this station, and the men had to haul cars to and from the mines, and then later haul them out toward the main line track as occasion might demand.

On the day in question the train crew had hauled two certain "drags" from the mine. Instructions were received from the telegraph operator at Williamson relative to the destination of the cars.

In the first drag of cars hauled on the morning Hope was killed, there were *two cars destined to St. Joseph, Missouri*. This fact is undisputed (85-86).

Following the hauling of this first string of cars, another or second drag was hauled in from the mines. The second drag did not contain any interstate cars.

The first string, which contained the two interstate cars, was placed on a track known as No. 1 track.

The second drag of cars was also put on this same No. 1 track, and in the switching movement that the men had to do after the second drag was brought in, they moved the second drag which contained the intrastate cars and *also moved and switched the first drag, containing the interstate cars*, being the cars destined from Iowa to St. Joseph, Missouri.

The switching of the cars at the mines was the last work the men had to do before they left the mines, and went out onto the main line track, intending then to go to Chariton, Iowa for dinner, and to get water for the engine.

The St. Joseph cars were on track No. 1. In the second switching movement, as testified to by the witness Elder:

"A. We shoved them down to five or six car lengths.

Q. On track one?

A. On track one" (171-172).

After these cars were shoved in on track No. 1, the witness Elder set the brakes on three loaded cars. One of these cars was destined to Allerton, Iowa, and *two were destined to St. Joseph, Missouri* (173).

"Q. Was that *the last work* that Conductor Hope's crew did with reference—

A. That was *the last thing we ever did*" (173).

It will be noted that the very last work that the crew did with the cars before going out onto the main line and before going to dinner, was *to move the interstate cars destined to St. Joseph, Missouri*, as well as the intrastate cars, and then *to set the brakes on the two interstate cars*.

Although the last and final work of decedent's crew was to "tie down" the string containing both interstate and intrastate cars, the actual work of setting the brakes on the two interstate cars was the last work the crew did.

It might be noted that this question of *setting the brakes on the interstate cars*, the last work of the crew, *was not disputed at the trial*.

It was also a part of the duty of the train crew to carry the "manifests" or bills of lading with them into Chariton.

These manifests were given to the conductor Hope before

his train started for Chariton. They were to be mailed from Chariton.

The train crew received orders *permitting them to enter the main line track* and take their engine and caboose and go to Chariton for dinner and to get water for the engine.

Naturally, the running of this train on the main line track was not *a matter of indifference* to the general interstate commerce of the carrier.

The engineer, Sam Woods, in charge of the locomotive hauling the caboose, in which Hope was riding, testified as to the order he received regarding the permission to enter the main line. This order was Exhibit 3 and the material portion was as follows:

"No. 912 engine unknown and all eastward extras wait at Chariton until 1:30 P. M. All first-class trains due Pershing before 12:10 P. M. have arrived or left" (109, 111, 266).

This order meant that the track was clear and that there were no trains approaching from the east (112-113).

"Q. I will ask it in this way, Mr. Woods, when you received that order, you may tell the jury whether that *gave you any preference as to entering the main line?*

A. *It did.*

Q. And what right did that give you, after you received that order?

A. *It gave me the right to move from Pershing to Chariton.*

Q. *Yes, over the main line?*

A. *Yes, sir.*

Q. And you may tell whether or not in giving you the right to move from Pershing to Chariton, whether

or not any other train, no matter what train it was, would have any right to use that track while you were on the way? \* \* \*

A. It just gave you the right to use that track from there to Chariton; eastbound train couldn't come against you" (116-118).

Pursuant to this order permitting this engine to go onto the main line track, the crew started for Chariton. Hope and the brakeman, Elder, were in the caboose of the train.

Without any notice or warning to the men that the train was to be expected, train No. 69, the Kansas City-St. Paul train, crashed into this caboose (114). In this collision Mr. Hope was injured (121).

At the time of the collision the men were still within the limits of Pershing Yard (122), although on the main line as aforesaid.

There is no dispute but that the work at the mine had not been completed at the time of the collision.

"Q. You may tell the jury whether it is customary when you pull the engines to pull *all* the loaded cars out and place them on the tracks at Pershing siding?

A. Yes.

Q. And you hadn't pulled them all out that day, had you?

A. No.

Q. And you were going in at that time to get water for your engine, weren't you?

A. Yes, sir, we were going in to get water and dinner.

Q. And unless, if this mine hadn't been entirely switched, I will ask you whether or not it is a fact that unless you got orders to go elsewhere it would be the

duty of Mr. Hope to complete the switching of that mine? Is that a fact?

A. Unless we got different orders to go some place to work?

Q. Yes.

A. Yes, it would have been his duty to have cleaned up the work at the mine" (136-138).

There were no orders received to go any other place and nothing in the evidence controverting the testimony of the witness Elder that the men were to return to the mine that afternoon (139-144).

There is no dispute on this question.

It is undisputed that the running of this engine and caboose on the main line had to be at the orders of the train dispatcher and that it must be run and operated with reference to other trains on the main line.

The manifests or bills, which were carried by Hope in the caboose, were never received by the operator, Myrtle Hanlon (79).

Q. Do you know what became of them?

A. I don't know, but I suppose they burned up in his caboose" (80).

The manifests were necessary to be used by this witness to make proper checks in her office as to the cars in-question (81-82-83).

The witness Elder saw the manifests in the caboose (163), but the caboose was demolished in the collision, and the conclusion is irresistible that the manifests were burned up in the fire following the collision.

The above statement as to the general work of the crew is given in detail in order that the facts showing the inter-

state character of decedent's employment may be clearly seen by the court.

#### DEFENDANT'S LIABILITY UNDISPUTED.

It was stipulated at the trial that the defendant was absolutely liable for the death of decedent and no defense on the question of liability was interposed.

#### THE DEFENSE.

After Hope was killed, A. D. Schendel was appointed as Special Administrator by the Probate Court of Hennepin County, Minnesota, following the usual practice prevailing in that state as to such appointments. This appointment was made on *February 20th, 1923*.

This action, under the Federal Employers' Liability Law, was commenced in the District Court of Steele County, Minnesota, by the Administrator on *February 21st, 1923*.

After this action was commenced, and on the second day of March, 1923, the *railway company* initiated proceedings in the State of Iowa under the Iowa Workmen's Compensation Act.

It is to be borne in mind that *no one in behalf of any survivor of decedent or any of his dependents started any proceeding under the Iowa Compensation Act*.

The railway company did initiate proceedings on March 2nd, 1923, some time after plaintiff had commenced the action in the District Court of Steele County, Minnesota.

Under the Iowa Compensation Act either party may initiate the proceedings.

The railway company did initiate the proceedings under

the Iowa Act, the application being entitled: "*In the Matter of C. Y. Hope, Deceased*" (428-431).

Before the commencement of these proceedings the Special Administrator had commenced the action, under the Federal Statute in the District Court of Steele County, Minnesota.

This action was based on the Federal Employers' Liability Act, the plaintiff specifically alleging interstate commerce as follows:

"5th: That at the time of the injuries to and the death of decedent, as herein set forth, defendant was a railroad corporation engaged and working in interstate commerce; and that at the time of the injuries to decedent, he was working for defendant as its agent and servant and as such was engaged in interstate commerce" (5th Paragraph, Complaint, 9-10).

#### THE ANSWER.

The original answer in the case was, in effect, a general denial with the allegation that decedent's injuries were due to his own want of care and that he assumed the risk.

There was a denial that decedent was engaged in interstate commerce, and it was alleged that his rights were governed by the Iowa Compensation Law.

Following this, a supplemental answer was interposed, when it was set forth that proceedings had been initiated by the railway company under the Compensation Act of Iowa.

Following this, there was a further supplemental answer to the effect that the District Court of Iowa had approved the award of the Commissioner, and that the award had ripened into a judgment, which was pleaded as a bar to the present case.

Jessie Hope was the surviving widow of decedent. She was the sole dependent as appeared from the evidence adduced at the trial in the District Court of Steele County, Minnesota.

When she was served with notice that the railway company wished to have her rights determined under the Compensation Act, she (not the administrator) filed an answer and set forth that Hope was engaged in interstate commerce at the time he was injured, and that an action was pending in the District Court of Minnesota under the Federal Act, the action having been brought by A. D. Schendel, as Special Administrator of the Estate of Clarence Y. Hope, deceased.

The Special Administrator of the estate, the respondent in this court, did not appear in the proceeding before the Iowa Compensation Board. The surviving widow, who was served with notice to appear, did appear by written pleading, but not personally, and set forth that Hope was engaged in interstate commerce, and that the Iowa court had *no jurisdiction* to make any award of damages because of his death.

She specifically claimed the *Board was without any power or authority to act in the matter.*

The railway company, however, prevailed in Iowa, and Mrs. Hope was unable to stop the Commission from proceeding.

They found in her favor (?) under the Iowa Compensation Act awarding her the small weekly payment which that statute provides for. No money was ever received or accepted by Mrs. Hope.

Following the award by the Commissioner, the proceedings were reviewed by the District Court of Iowa, and a judgment in favor of Mrs. Hope was entered in the District Court of Lucas County, Iowa.



This judgment is "*In the Matter of the Award of Compensation on Account of the Death of C. Y. Hope, Deceased; Mrs. C. Y. Hope, Appellant, v. Chicago, Rock Island & Pacific Railway Company, Appellee*" (484-485).

It will here be noted that the Compensation proceedings at first were "*In the Matter of C. Y. Hope, Deceased,*" and that the judgment was entered: "*In the Matter of the Award of Compensation on Account of the Death of C. Y. Hope, Deceased; Mrs. C. Y. Hope, Appellant, v. Chicago, Rock Island & Pacific Railway Company, Appellee.*"

There is no evidence to show that Mrs. Hope attended any hearing of the Industrial Commission. She was not present and did not participate in any of these proceedings, but at all times protested that the right to recover damages for the death of her husband was in the hands of a Special Administrator proceeding under a law of the United States.

The Iowa Commission paid scant heed to the action under the Federal Statute, and the Commission, being able to act with more celerity than the ordinary common law court, made an award to Mrs. Hope before the District Court of Steele County, Minnesota, could try the action based on the law of Congress.

It will be remembered, however, that the Special Administrator in Minnesota was *appointed prior to the commencement of proceedings under the Compensation Act of Iowa*, and that the action under the Federal statute *was started before the Iowa proceedings*.

The defendant offered the Iowa judgment as a complete bar to the action under the Federal statute. While defendant conceded that there was a lack of identity of parties, it contended that Mrs. C. Y. Hope was the sole beneficiary under the Federal statute, and that, therefore, a judgment

in her favor under the Compensation Act, the award being made to her as widow, of Clarence Y. Hope, would constitute a bar to the maintenance of the action under the Federal statute.

The railway company also claimed that if the Iowa judgment could not be *res adjudicata* in the full and complete sense, it did operate as an estoppel because the Iowa Commission determined that Hope was engaged in intrastate commerce; that this determination was *one of fact*, and that a finding of this fact was a bar to any further inquiry into the nature of Hope's employment.

#### THE POSITION OF THE TRIAL COURT.

The trial court submitted the question of interstate commerce to the jury.

It will at once be apparent to the court that decedent Hope *was* engaged in interstate commerce, *as a matter of law*, but the trial court gave the railway company the benefit of any doubt on the question, and submitted it as a question of fact for the jury, leaving it for them to determine whether "his work was so closely and intimately connected with the general interstate work of the carrier as to be deemed in law a part of it."

The jury were told further that if decedent Hope was not engaged in interstate commerce, there could be no recovery by the plaintiff.

The question of damages was properly submitted to the jury, and a general verdict was returned in plaintiff's favor.

Under the Minnesota practice, after the verdict was returned, a motion for judgment notwithstanding the verdict, or for a new trial, was made by the railway company. This

(2) Whether proceedings taken in Iowa under its compensation act, upon the initiative of the defendant, after the commencement of this action, resulting in an award to the widow of the decedent, bars a recovery upon the ground that it was there determined that the deceased was engaged in intrastate commerce.

(3) Whether there is such identity of parties as to make the finding that the decedent was employed in intrastate commerce available as an estoppel" (638).

These questions were all answered in plaintiff's favor, the court holding that "whether he was employed in interstate commerce was at least one (a question) for the jury" (649).

The Supreme Court, in answering the second question as to whether the Iowa award could bar a recovery under the Federal statute, quoted the jurisdictional provision of the Act, saying:

"The provision as to jurisdiction is as follows: 'Under this act an action may be brought in circuit (now district) *court* of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the *courts* of the United States under this act shall be concurrent with that of the *courts* of the several states' " (654-655).

It was next said by the Minnesota Supreme Court that when its *jurisdiction was invoked, it was its duty to proceed with the action*, citing *Second Employers' Liability Cases*, 223 U. S. 1 (654-655).

The court next took the position that the Federal Act, within the field which it covers, *supersedes the common law*

*liability of defendant and also State Compensation Acts (657).*

# IOWA PROCEEDING NOT ACCORDING TO COURSE OF COMMON LAW.

Mr. Justice Dibell, speaking for the Minnesota court, then called attention to the fact that Congress intended the Federal right to be enforced in a court proceeding as at common law, saying:

*"The right of action which the Federal Employers' Liability Act gives is to be enforced in a court proceeding according to the course of the common law in the orderly investigation of facts and the application of the law. That is the clear purpose of the act. Congress so intended for it designated courts of that character to administer it.*

*The proceeding before the industrial commissioner is not according to the course of the common law. It is a special statutory proceeding, summary in character, and largely administrative, though involving judicial discretion and providing for a judicial review" (657-658).*

Following this subject further, as it related to the claim that the Iowa judgment was *res adjudicata* and acted as an estoppel as to the question of the character of decedent's employment, Mr. Justice Dibell said:

*"If this view be the correct one the question whether courts of common law jurisdiction, designated by Congress, shall determine the employe's rights in a common law proceeding, or whether they shall be determined by compensation boards proceeding summarily, may depend upon which moves with the greater celerity; and*

in the ordinary case it is the compensation board. It is illustrated here. The *award* was made *within 18 days* after the commencement of the proceeding, and in 90 days after the commencement of the proceeding the award was affirmed by the court. It was a year after its commencement before the action based on the Federal right was called for trial" (663-664).

Mr. Justice Dibell further said:

"It seems that something is wrong in the law or its administration, if one claiming and enforcing a cause of action under the Federal Act, the character of the employment as interstate determining his right, and the character of his employment being uncertain as a question of law, or for the jury as a question of fact, must lose it if he seeks to protect himself in a less valuable right under the compensation act. See *Corbett v. Boston & Maine R. Co.*, 219 Mass. 351. This is not quite the case here, for the beneficiary fought against instead of for the application of the compensation act" (666).

Following this Mr. Justice Dibell made a statement which in reality is the fundamental thing for consideration here. The statement is—

"The *determining single question* was whether the decedent was employed in interstate commerce" (668).

It being found that decedent *was* engaged in interstate commerce, the court said:

"We are content to hold that *the substantive right given the employee or his representative by Congress under express constitutional grant, with the courts to which he may go for its enforcement pointed out to him, is a superior substantive right*; and that *when he or his*

*representative has chosen the forum to which to submit his cause, he cannot, against his objection and upon the initiative of his employer, be required to submit it in a summary proceeding commenced later under a compensation act" (671-672).*

The court next took the position that as plaintiff was not a party to the compensation proceeding, there was no identity of parties between Mrs. C. Y. Hope, as widow, and A. D. Schendel, as Special Administrator of the Estate of Clarence Y. Hope, Deceased (675), relying upon the case of *Troxell v. Delaware, L. & W. R. Co.*, 227 U. S. 434 (678).

## ARGUMENTS, POINTS AND AUTHORITIES.

### THE QUESTIONS FOR THIS COURT TO DETERMINE.

As we view the record, there are three questions to be determined by this court. The questions are:

*1st. Was the decedent engaged in interstate commerce as a matter of law, or was there evidence sufficient to justify the submission of the question to the jury?*

*2nd. Can proceedings under the State Workmen's Compensation Act, taken upon the initiation of the defendant after the commencement of an action under the Federal statute, interfere with, bar, or prevent a recovery under the Federal Law, on the theory that the Commission has found as a "fact" that decedent was engaged in intrastate commerce?*

*3rd. Whether there is such identity of parties in a proceeding entitled "In the Matter of the Award of Compensation on Account of the Death of C. Y. Hope, Deceased, Mrs.*

*C. Y. Hope, Appellant vs. Chicago, Rock Island & Pacific Railway Company, Appellee," and the parties, as appear in the case at bar, that is, where A. D. Schendel, as Special Administrator of the Estate of Clarence Y. Hope, Deceased, is plaintiff—whether there is such identity of parties as to make a finding in the one proceeding a bar to the other.*

#### THE FIRST QUESTION.

*I. Was the decedent engaged in interstate commerce as a matter of law, or was there evidence sufficient to justify the submission of the question to the jury?*

The evidence, without dispute, showed that the last work Hope did was *to set the brakes on two interstate cars*. He and his crew then left with orders permitting them to go onto the main line track, which track they were going to use to go to Chariton for dinner and for water for the engine.

They were going to return in the afternoon and *complete their work* at the mines and *do other switching of these particular cars*.

Hope carried with him the manifests or bills of lading showing the contents of the cars which had been switched, their destination, etc. These lists pertained to two interstate cars as well as the intrastate cars.

While enroute to Chariton and on the main line track, their train was run into by another interstate train, and Hope received injuries from which he died.

Hope was engaged in interstate commerce because:

1st. The last work of the crew had to do with two interstate cars, being the cars consigned from Pershing, Iowa, to St. Joseph, Missouri (173).

2nd. His train was permitted to go onto the main line

and had to be run with reference to the presence of other trains on such main line track.

3rd. Hope's crew carried the manifests and bills with them which were a necessary part of the carrier's general interstate work.

4th. Taking the entire work into consideration, it clearly showed that it was not a matter of indifference to the general work of the carrier, but that it bore such a close relation to the carrier's general work as to be deemed in law a part of it.

#### GENERAL TEST OF INTERSTATE COMMERCE.

The test as to when a servant is engaged in interstate commerce and the general rules have been stated many times by the United States Supreme Court. For instance—

“Was the employee, at the time of the injury, engaged in interstate transportation or in work *so closely related to it* as to be practically a part of it”?

*Shanks v. D. L. & W. R. Co.*, 239 U. S. 556, 60 L. Ed. 436.

“Generally when applicability of the Federal Employer's Liability Act is uncertain, the character of the employment *in relation to commerce*, may be adequately tested by inquiring whether at the time of the injury the employee was engaged in work *so closely related with* interstate transportation as practically to be a part of it.”

*So. P. R. Co. v. Ind. Accident Com.*, 251 U. S. 259, 64 L. Ed. 258.

*Ind. Accident Com. v. Davis*, 259 U. S. 182, 66 L. Ed. 888.



"Was the work being done *independently of the interstate commerce* in which the company was engaged or was it so *closely connected therewith* as to be a part of it. -Was its performance *a matter of indifference* so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier?"

*Kinzell v. C., M. & St. P. R. Co.*, 250 U. S. 130, 63 L. Ed. 892.

*Pederson v. D., L. & W. R. Co.*, 229 U. S. 146, 57 L. Ed. 1125.

The tendency of the courts has been liberal rather than restrictive in determining what would constitute interstate commerce.

We call attention to the case of *Erie R. Co. v. Collins*, 253 U. S. 77, 64 L. Ed. 790 and *Erie R. Co. v. Szary*, 253 U. S. 86, 64 L. Ed. 794.

Basing the proposition solely on the last work Hope's crew did—the setting of the brakes on the two interstate cars—and without reference to any other acts having to do with the carrier's interstate work, it is clear that Hope was engaged in interstate commerce not as a fact question, but absolutely and unqualifiedly as a matter of law.

"To separate his duties by moments of time or particular incidents of its exertion would be to destroy its unity and commit it to confusing controversies."

*Phila. & R. R. Co. v. Di Donato*, 256 U. S. 237, 65 L. Ed. 955.

Reference may be made to *New Y. C. R. Co. v. Carr*, 238 U. S. 261, 59 L. Ed. 1299, where a brakeman was setting out two intrastate cars from an interstate train, and his work was held to be interstate in character.

In that case, as stated by Mr. Justice Lamar :

"The matter is not to be decided by considering the physical position of the employee at the moment of the injury. If he is hurt in the course of his employment while going to the car to perform an interstate duty, or if he is injured while preparing an engine for an interstate trip, he is entitled to the benefits of the Federal Act."

In the Parker case a fireman was killed while his engine was transferring an empty car from one switch track to another. The purpose was to reach and move an interstate car. This work was held to be interstate in character.

*Louisville & N. R. Co. v. Parker*, 242 U. S. 12, 61 L. Ed. 119.

Counsel for appellant refer to *Illinois C. R. Co. v. Behrens*, 233 U. S. 472, 58 L. Ed. 1051. This case is not in point because there was no *purpose* to move interstate cars or to do any work with interstate cars in that case. There was simply a switching movement of purely intrastate cars.

As stated in the Parker case, *supra* :

"The difference is marked between a mere expectation that the work done would be followed by other work of a different character as in *Illinois C. R. Co. v. Behrens*, 233 U. S. 473, and doing the act for the *purpose* of furthering the later work."

The work being done under the decisions referred to was interstate without any reference to any main track movement at the point of injury.

Leaving the question of switching interstate cars for a moment, however, the work, it will be seen, was interstate in character on another theory.

Hope's train *entered the main line under orders from the dispatcher*. This movement had *reference to the movement of other cars on the main line*.

This movement had "relation to commerce" of the defendant; it had relation to the movement of an oncoming interstate train.

The operation of this train on the main line was not "being done *independently* of the interstate commerce in which the company was engaged."

It was so closely connected with that commerce as to be part of it. It certainly was not "*a matter of indifference so far as that commerce was concerned*."

Plaintiff does not contend that the interstate character of train No. 69, which struck decedent, would, in and of itself, make the work of Hope interstate, but that under all the evidence in this case the movement being under the orders of the dispatcher and having reference to the passing of other trains, and having to be made with reference to the safety of interstate trains, it was at least a question for the jury whether that movement in and of itself did not constitute interstate commerce; whether it was not *so closely related to the general work* of the carrier as to be a part of it.

Reverting now to the work at the yards, that was interstate commerce, as a matter of law. Should there, however, be any question as to this, there cannot, it seems to us, be any question but that the entire evidence presented a jury issue as to whether or not decedent's work bore that relation to the general interstate work of the carrier which would make his employment interstate.

It does not need argument to convince the court that Hope was engaged in interstate commerce in doing the work that was being done, when the two St. Joseph cars were being

moved and switched and the brakes thereon set, previous to going onto the main line for lunch at Chariton and for the purpose of obtaining water for the engine. This evidence coupled with the movement on the main line shows interstate commerce as a matter of law.

In many cases the Supreme Court of the United States has stated that where the question as to the character of the work is doubtful, the issue should be determined *as a question of fact by the jury*.

*Pennsylvania Co. v. Donat*, 239 U. S. 50, 60 L. Ed. 139.

The question of interstate commerce is plain on many phases.

In *St. Louis, S. F. & T. R. Co. v. Seale*, 229 U. S. 156, 57 L. Ed. 1129, it appeared that a car checker was injured while taking down the numbers of cars in defendant's railway yards.

The Supreme Court of the United States held that the taking of these numbers and the making of the records constituted interstate commerce.

By the same reasoning the carrying of the manifests in the caboose by Hope was work in furtherance of interstate commerce.

The record shows that the railway company had to have these manifests in order to complete their records as to the points of origin and destination of the cars in question.

It was part of Hope's duty to carry the manifests to Chariton and to see that they were delivered to the operator at Williamson. While carrying these manifests, under the doctrine of the *Seale* case, he was, by reason of this fact alone, engaged in interstate commerce.

In considering the question of interstate commerce, while

it may inferentially appear from the record, by reason of the report of the Deputy Industrial Commissioner, that the witness Elder was not a witness at the hearing before the Commission, it is clear that the railway company must have known of the movement of these cars, and must have known of the order permitting the train to go on the main line track, and must have known that the duty of Hope's crew was to carry the manifests in question on the main line track to Chariton for the purpose of mailing them, and it must have known that this was a necessary duty to be performed in connection with the general interstate work of the carrier.

This being so, the position in which the railway company is now is similar to the position of the railway company in *Osborne v. Gray*, 241 U. S. 16, 60 L. Ed. 865.

In that case the Supreme Court, speaking by Mr. Justice Hughes, said:

"The defendants knew the actual movement of the cars, and, failing to inform the court upon this point, cannot complain that they have been deprived of a Federal right."

By the same line of reasoning the railway company here cannot complain that they have been deprived of a Federal right because the acts of the Commissioner have not been accepted as final when it is apparent to the court that had the railway company fully presented the facts to the Commission, the Commission could not have come to any other conclusion but that decedent was engaged in interstate commerce.

In *Texas & P. R. Co. v. Rigsby*, 241 U. S. 33, 60 L. Ed. 874, it was said:

"The doing of plaintiff's work, and his security while

doing it, cannot be said to have been wholly unrelated to the safety of the main track as a highway of interstate commerce."

In the case at bar, it cannot be said that the running of the train in charge of Conductor Hope under express orders from the dispatcher and the running of it on the main line of defendant had no relation "to the safety of the main track as a highway of interstate commerce."

The petitioner in its brief in this case, on page 7 says:

"Petitioner *contended* in the court below, as will be seen from the opinion below (R. 114-116), and *still contends* that (even without the Iowa judgment) decedent was engaged in *intrastate* commerce as a matter of law."

It will thus be seen that the railway company *litigated the issues of interstate commerce* in the District Court of Steele County, Minnesota, and still contends the work was intrastate.

Was decedent engaged in interstate commerce?

Was it an act of interstate commerce to set the brakes on the two interstate cars as the last act of the crew in question before going to dinner?

In the Rigsby case just quoted from, Rigsby was setting the brakes on some purely intrastate cars. The question involved in that case was whether the Safety Appliance Act applied regardless of the character of the commerce in which Rigsby was engaged.

In considering this question, the court used this language:

"Perhaps upon the mere ground of the *relation of his work* to the immediate safety of the main track, plaintiff's right of action might be sustained."

been many times decided, and under the adjudicated cases in this court, decedent was engaged in interstate commerce.

Taking it now as an established fact and established as a proposition of law that decedent *was* engaged in interstate commerce, *on the record presented to the District Court of Steele County, Minnesota*, and upon the record now presented to this court upon which the recovery is based, can the nature or character of decedent's employment be said to be intrastate *because of some other record?*

In other words, if we now assume that, upon the record before this court, decedent *was* engaged in *interstate commerce*, can it be said that his work was intrastate because of some other adjudication by some other tribunal?

*The only tribunal having authority to hear causes under the Federal Act is a court as known and constituted generally at common law.*

#### WHO IS TO DETERMINE INTERSTATE COMMERCE?

Let us suppose the State of Iowa should by statute enact that an employee engaged in working about a car destined to a point outside the State of Iowa from the State of Iowa should be deemed to be engaged in *intrastate* commerce.

Could the Legislature by such pronouncement make an act *intrastate* which was in fact *interstate*?

To bring to the attention of the court an example where the question might be more likely to arise, let us suppose this state of facts—that the Legislature of a state, in order to stop the solicitation of orders by house to house canvassers for the sale of merchandise, should pass a law saying that the solicitation by a canvasser of sales of hosiery in one state, which hosiery was to be manufactured and delivered

from another state, should be deemed *intrastate* in character, and that such action should not be deemed to be in any way *interstate*.

Having made this determination, then let us assume that the state should attempt to tax such activity. Suppose the state should say, in substance, "We have decreed that certain acts are intrastate in character, and being intrastate, we have a right to tax them," and should thereupon impose the tax.

Suppose further that the matter were to come before this court with the claim by the party taxed that his business was *interstate* and not subject to regulation or taxation by a state.

Suppose the state should meet such argument by saying that the question of the nature of the business was not open for discussion: that the Legislature had determined that certain acts were *intrastate* and that determination is final.

This court would unhesitatingly say that the Legislature cannot say that certain acts shall be deemed done in *intrastate* commerce, if, as a matter of fact, those acts constitute the doing of business in interstate commerce.

Or, to state it another way, *this court will determine for itself what constitutes the doing of interstate business.*

While the court might accept the decision of a State Supreme Court as to what constituted doing business within that state, within the meaning of its own laws, a different proposition presents itself when the question arises as to whether certain facts constitute the doing of business interstate in nature.

As stated by Mr. Justice Butler in *Kansas City Structural Steel Co. v. State of Arkansas*, 46 Sup. Ct. 59:

"But this court will determine for itself whether what was done by plaintiff in error was interstate commerce



*and whether the state enactments as applied are repugnant to the commerce clause."*

By the same line of reasoning, when an action is properly brought under a law of the United States in a court of competent jurisdiction, *that court will determine for itself* whether the work done by the plaintiff was interstate in character.

When the issue comes before this court, we submit that this court has the power of *determining for itself* whether what was done was work in interstate commerce or not.

Let us see where a contrary decision would lead us.

In a case where a record showed *conclusively* and even *concededly* that plaintiff *was engaged in interstate commerce* so as to be within the protection of the Federal statutes, the court might be placed in a position of saying that such work, even though admittedly interstate, would not bring into operation the Federal law because some Commissioner, *in a supplementary proceeding under a state statute*, had said that the work, which *was really interstate*, was *intrastate*, and because the Commissioner had said that interstate commerce was in fact intrastate, the court would be precluded from applying the Federal law.

The Supreme Court of the United States in *Real Silk Hosiery Mills v. City of Portland*, decided May 25th, 1925, 45 Sup. Ct. 525, held that the ordinance imposing a license tax on solicitors taking orders for hosiery to be shipped to buyers by a manufacturer in another state, burdened interstate commerce and was void.

The court quoted with approval from *Shafer v. Farmers' Grain Co.*, 45 Sup. Ct. 481, to the effect that though the theory of the law as expressed was to prevent possible frauds, this

would not justify legislation which really interfered with the free flow of legitimate interstate commerce.

Could the decision of this court have been *any different* had the city of Portland, by ordinance, or the State of Oregon, through its Legislature, *said* that the solicitation of such hosiery *should constitute intrastate commerce?*

This would, in effect, be to say that that which was square was in fact round, or that that which was *in fact interstate was intrastate*. Manifestly, this could not be done.

The question of interstate commerce in an action under the Federal Act must be determined by the tribunal before whom the action is pending and as Mr. Justice Butler said in the Kansas City case, *supra* :

*"This court will determine for itself whether what was done by plaintiff in error was interstate commerce."*

Under the facts in the case at bar, the only conclusion the court can come to is that decedent Hope was engaged in interstate commerce.

There can, of course, be no question but that the state cannot interfere with interstate commerce under the guise of "regulation." As recently stated in *Alpha Portland Cement Co. v. Commonwealth of Massachusetts*, 45 Sup. Ct. 477 :

*"It must now be regarded as settled that a state may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business."*

It is true that a state cannot call that *intrastate* which is *interstate* and then tax it or regulate it.

The same reasoning must apply in considering the question of interstate commerce, and the bearing of the Employers' Liability Act upon the relation and status of railway em-

ployees engaged in such commerce.

If a state may not *tax* interstate commerce under the *guise of regulating intrastate business*, as stated in the Alpha Portland Cement Co. case, neither may the state, under the *guise of regulating intrastate commerce*, take away the right of an injured man given him or his surviving dependents under a Federal statute.

In the case now before this court, Hope was engaged in interstate commerce, or he was engaged in intrastate commerce.

To what do we look to determine this question?

To the record in the case at bar. To the nature of the work he was doing, and, when we make that search and look into the nature and character of his work, its interstate status is plain.

This being so, *neither state regulation nor legislation can interfere*. It cannot interfere under the theory of regulating intrastate commerce, It cannot interfere under the *guise of regulating intrastate commerce* if the regulation or interference be in fact that of *interstate commerce*.

II. *Can proceedings under the State Workmen's Compensation Act, taken upon the initiation of the defendant after the commencement of an action under the Federal statute, interfere with, bar, or prevent a recovery under the Federal law on the theory that the Commission has found as a "fact" that decedent was engaged in interstate commerce?*

While what has been said heretofore relative to the attempt to burden interstate commerce by calling it intrastate commerce has some bearing on proposition two, the question will here be considered from the point of view of the supremacy of the Federal statute and whether the state can interfere with its operation.

### THE FEDERAL ACT IS SUPREME.

At this late day it can hardly be said by any one that the Federal Act is not supreme, and that where Congress has taken possession of the field of interstate commerce, it is not supreme.

In the report of the Senate Committee on the Amendment to the Act of 1910, mention was made of the supremacy of the federal law, this language being used:

"The federal law is imperative, mandatory and paramount over every foot of the soil of every state. It is in no sense foreign when its application or enforcement is sought in the courts of a state. *No policy of a state can impair its imperative obligation.* No official of a state sworn to support the Constitution of the United States can deny the enforcement of a statute of the United States, made in pursuance of the United States Constitution. Such law by the Constitution is made 'the supreme law of the land, anything in the Constitution or laws of any state to the contrary notwithstanding.'"

There is no question but that the Federal Act is superior to any state regulation and supersedes all state laws on the subject of the employers' liability in Interstate Commerce Cases. See *Seaboard Air Line Co. v. Horton*, 233 U. S. 492, 34 S. C. 635, 58 L. Ed. 1062; *Employers' Liability Cases*, 223 U. S. 1, 32 Sup. Ct. 169, 56 L. Ed. 327; *St. Louis, etc. Ry. Co. v. Hesterly*, 228 U. S. 702, 33 Sup. Ct. 703, 57 L. Ed. 1031.

In *Erie Ry. Co. v. Winfield*, 244 U. S. 170, 37 Sup. Ct. 556, 61 L. Ed. 1057, the facts briefly were that Mrs. Winfield made application for compensation under the New Jersey Compensation Act for injuries received by and resulting in the death

of her husband while employed by the Erie Ry. Co. in that state. It appeared that an employee was crossing certain tracks in the yards of the railway company, under circumstances which made his employment interstate, within the Federal Act.

The railway company was not, however, guilty of any *negligence*. Application for compensation was made, and it was claimed that the Employers' Liability Law provided for compensation *only* in the event that the railway company was *negligent*; that the railway company, *not being guilty of negligence* in the particular case, the Federal Act was without application and compensation could be made under the New Jersey law.

The Supreme Court of the United States, in an opinion by Mr. Justice Van Devanter, held that the Federal Act was paramount and exclusive and <sup>d</sup>established rules and regulations intended to operate uniformly in all of the states.

It was said:

"By the Federal Act the *entire subject*, as respects carriers by railroad and their employees in interstate commerce, was taken *without reach of state laws*. It is beyond the power of any state to *interfere with the operation of that act*."

A similar situation arose in the case of *New York Railway Company v. Winfield*, 37 Sup. Ct. 546, 61 L. Ed. 1045, 244 U. S. 147. In that case it also appeared that Winfield was engaged in interstate commerce and was injured under circumstances *involving no negligence* on the part of the railway company.

He was awarded compensation under the New York Compensation Act and the award was set aside by the Supreme

Court of the United States. In this opinion it is clearly shown that *the Federal Act cannot be interfered with by state courts.*

We especially call the court's attention to the following reference in the above case to the reports of the congressional committees prior to the passage of the statute:

"And the reports of the congressional committees, having the bill in charge disclose without any uncertainty that it was intended to be comprehensive \* \* \* and the legal status of such employers' liability for personal injuries instead of being subject to numerous rules, will be fixed by one rule in all the states."

Again it is said:

"That the act is comprehensive and also exclusive is distinctly recognized in repeated decisions of this court. Thus, in *Missouri, K. & T. R. Co. v. Wulf*, 226 U. S. 570, 576, 57 L. Ed. 355, 363, 33 Sup. Ct. Rep. 135, Ann. Cas. 1914B, 134, and other cases, it is pointed out that the subject which the act covers is 'the responsibility of interstate carriers by railroad to their employees injured in such commerce'; in *Michigan C. R. Co. v. Vreeland*, 227 U. S. 59, 66, 67, 57 L. Ed. 417, 419, 420, 33 Sup. Ct. Rep. 192, Ann. Cas. 1914C, 176, it is said that 'we may not piece out this Act of Congress by resorting to the local statutes of the state of procedure or that of the injury'; that by it 'Congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce,' and that it is 'paramount and exclusive'; in *North Carolina R. Co. v. Zachary*, 232 U. S. 248, 256, 58 L. Ed. 591, 594, 34 Sup. Ct. Rep. 305, Ann. Cas. 1914C, 159, 9

N. C. C. A. 109, it is held that where it appears that the injury occurred while the carrier was engaged and the employee employed in interstate commerce, the Federal Act governs to the exclusion of the state law."

Let us go back and consider the language of Mr. Justice Van Devanter in *Erie R. Co. v. Winfield*, heretofore quoted.

"By the Federal Act the entire subject, as respects carriers by railroad and their employees in interstate commerce, was taken *without the reach of state laws*. It is beyond the power of any state to *interfere* with the operation of that act."

If the subject is *without the reach of state laws*, how can a commission, such as the Industrial Commission of Iowa, under the guise of determining a fact or determining a question of law, *deprive a citizen of an actual Federal right*?

As the record in this case now stands, Hope was engaged in interstate commerce. As Judge Senn stated in his memorandum:

"The Iowa tribunal was *without authority* to render an order and judgment which is conclusive upon this court and which will *defeat a right given to the plaintiff by congress*" (591).

We could not say that the *entire subject was without the reach of the state laws* if it were left open to the Industrial Commission of Iowa to determine a fact question, which would take away the Federal right.

It matters little whether the commission attempts to take away the Federal right by determining a *question of law* or by determining a *question of fact*. If the employee, at the time was *in reality engaged in interstate commerce*, then

*every act of the Iowa Industrial Commission was void and of no effect whatever.*

The Federal Act being supreme and this not being open to any question, it must of necessity follow that *the State cannot interfere with the operation of the Federal statute in any way.*

The fact that the Federal statute with its rules and its remedies may be inconsistent with the public policy of the State would not permit the State, under the guise of public policy, to interfere with the operation of the act.

This phase of the question was presented to the Circuit Court of Appeals for the Eighth Circuit, in *Chicago, M. & St. P. R. Co. v. Schendel*, 292 Fed. 326.

In that case, the railway company sought to prevent a trial of an action under the Federal statute in Minnesota.

The accident occurred in Iowa and the railway company procured an injunction from the Iowa court restraining witnesses from testifying in Minnesota and restraining them from giving evidence by deposition in Minnesota or elsewhere.

This was on the ground that the Federal statute was in conflict with the public policy of the State.

Judge Kenyon, speaking for the Circuit Court of Appeals, said :

*"The Iowa public policy cannot destroy this Federal right. In a conflict between such policy and the Federal right given to a citizen of Iowa, the public policy must yield. The Constitution and the laws made thereunder are the supreme law of the land, and are as much the law of the State as are the State enactments."*

Speaking further of a State enactment which permitted the State to interfere with the operation of the Federal Act,



Judge Kenyon said :

"The Act of the Iowa legislature, as construed by the Supreme Court of the State, *taking from an Iowa citizen the Federal right under the Employers' Liability Act to go into the United States Court and bring suit for injury, or from his estate, if death results therefrom, in any district in which defendant was doing business at the time the action was commenced is unconstitutional, and the order of the District Court unauthorized and void. It amounts to a nullification of the Federal statute.*"

It will be remembered that in *Erie R. Co. v. Winfield*, *supra*, Mr. Justice Van Devanter said :

"It is beyond the power of any state to *interfere with the operation of that act.*"

Did the Commission of Iowa *interfere with the operation of the act*?

The railway company did not institute these proceedings before the Commission until *after* the suit under "that act" (being the Federal statute) had been commenced in Minnesota. From the very start the proceedings before the Commissioner in Iowa were void.

The Federal statute is not only comprehensive but it is *exclusive*. No state can *interfere with, hamper or hinder* a citizen pursuing his rights under that statute.

It was said in the *Second Employers' Liability Cases*, 232 U. S. 1, 56 L. Ed. 327 :

"The existence of the jurisdiction creates an implication of duty to *exercise it*, and that its exercise may be onerous does not militate against that implication.

The suggestion that the act of Congress is not in

harmony with the policy of the State, and therefore that the *courts* of the State are free to decline jurisdiction, is quite inadmissible, because it presupposes what in legal contemplation does not exist."

We have a situation, therefore, where the State court of Steele County had jurisdiction and was obliged to exercise that jurisdiction.

In an attempt to defeat the Federal jurisdiction, the railway company, which had already been sued in the present proceedings, instituted a proceeding against one of the beneficiaries named in the complaint and asked that the Industrial Commission of Iowa determine that this beneficiary receive compensation under the Compensation Law of Iowa.

This scheme to defeat Federal recovery cannot succeed. Otherwise the Federal statute, as stated by Judge Kenyon, *would be nullified*.

Any act of that Commission attempting to *limit* the Federal right was *void* and inoperative because in conflict with the law of Congress.

The Legislature of Iowa or the State of Iowa, acting in its sovereign capacity, could not, by any enactment, limit or restrict the right given by Congress.

This being so, the Industrial Commission, a *subordinate arm* of the State, could not do that which the State could not do in its *sovereign capacity*.

There is no escape from the conclusion that the right of recovery under the Federal statute cannot be defeated by the Industrial Commission; nor has that Commission power to *hinder, delay or interfere* with a citizen prosecuting a Federal right.

Although counsel for appellant in this case seem to con-

by State Compensation Acts.

In the case of *Washington v. Dawson*, 264 U. S. 218, 68 L. Ed. 646, Mr. Justice McReynolds referred to the case of *Southern P. R. Co. v. Jensen*, 244 U. S. 205, saying:

"\* \* \* The work of a stevedore, in which the deceased was engaging, is *maritime in its nature*; his employment was a maritime contract; the injuries which he received were likewise maritime; and the rights and liabilities of the parties in connection therewith were matters clearly within the admiralty jurisdiction. *Atlantic Transp. Co. v. Imbrovek*, 234 U. S. 52, 59, 60, 58 L. Ed. 1208, 1211, 1212, 51 L. R. A. (N. S.) 1157, 34 Sup. Ct. 733. *If New York can subject foreign ships coming into her ports to such obligations as those imposed by her Compensation Statute*, other states may do likewise. The necessary consequence would be *destruction of the very uniformity in respect to maritime matters which the Constitution was designed to establish.*"

To the same effect is *Robins Dry Dock & Repair Co. v. Dahl*, 45 Sup. Ct. 157, in which it was held by this court that "repair work on a completed vessel has a *direct relation to navigation*, and the *rights and liabilities* of the parties *depend on the general maritime law*, and *cannot be enlarged or impaired by state statutes.*"

#### CONFLICT OF WORKMEN'S COMPENSATION ACT WITH FEDERAL STATUTE.

Passing from the general proposition that the Federal Act is supreme, we wish to call the court's attention to several rulings wherein the question of the interference by a state,

through Workmen's Compensation Acts, with rights given by a Federal statute have been involved.

In many of these cases the claimed Federal rights arose under certain of the Safety Appliance Acts of Congress.

These Safety Appliance Acts do not, in and of themselves, confer a right to maintain a private action to recover damages for injuries, but are in the nature of penal statutes.

In some of the cases, it was contended that an employee could be put to an election whether he would rely on a State Compensation Act or on a Federal statute.

In some places *the law* made the election for the employee.

In *Eric R. Co. v. Winfield*, 244 U. S. 70, 61 L. Ed. 1057, *supra*, the question of an election by an employee was raised, it being claimed that an employee was presumed to have made such election.

In this case, Mr. Justice Van Devanter said:

*"But such a presumption cannot be indulged here, and this for the reason that by the Federal Act the entire subject, as respects carriers by railroad and their employees in interstate commerce, was taken without the reach of the state laws. It is beyond the power of any state to interfere with the operation of that act, either by putting the carrier and their employees to an election between its provisions and those of a state statute, or by imputing such an election to them by means of a statutory presumption."*

See 61 L. Ed., page 1065.

In *Hogan v. New York C. & H. R. Co.*, 139 C. C. A. 328, 223 Fed. 890, 12 N. C. C. A. 1050, it was held that the Federal Act supersedes State legislation, and that an employee engaged in interstate commerce

"has only one remedy, namely, that under the Federal Act and is not, *by bringing and discontinuing an action under a State statute*, barred by the doctrine of election of remedies, from subsequently bringing *an* action under the Federal statute."

In that decision the following language of Mr. Justice Holmes, then Judge of the Massachusetts Supreme Court, from 156 Mass. 193, 30 N. E. 691, is quoted:

"Election exists when a party has two alternative and inconsistent rights, and it is determined by a manifestation of choice. *Metcalf v. Williams*, 144 Mass. 452, 454 (11 N. E. 700). But the fact that a party wrongly supposes that he has two such rights, and attempts to choose the one to which he is not entitled, is not enough to prevent his exercising the other, if he is entitled to that. There would be no sense or principle in such a rule. *Butler v. Hildreth*, 5 Mete. 49, 52; *Snow v. Alley*, 144 Mass. 546, 554, 560 (11 N. E. 764, 59 Am. Rep. 119); *Whiteside v. Brawley*, 152 Mass. 133, 135 (24 N. E. 1088); *Morris v. Rexford*, 18 N. Y. 552, 557."

See 12 N. C. C. A., page 1055.

In *Waters, et al. v. Guile*, 234 Fed. 532 (C. C. A., 6th Circuit), the question was raised as to the supremacy of the State or Federal statutes.

In that case it appeared that after the accident, plaintiff's wife applied to the Industrial Board of Michigan and signed a claim expressed to be under that Act. Two certain notices addressed to the railway company, claiming compensation under the act were signed by her husband, the plaintiff. One copy was sent to the defendant, and the other was returned to the Industrial Board.

The defendant took the matter up and prepared to settle on a basis of the average weekly wages. A dispute arose because of the amount of the average wages, and the settlement was not in fact carried out, nor was arbitration asked for under the Act.

In this situation, the Circuit Court was of the opinion that the Federal Act must govern. Knappen, Circuit Judge, in writing the opinion, spoke of two inconsistent remedies and of the fact that the deliberate choice of one remedy by the servant might bar him from pursuing the other remedy. However, Judge Knappen said:

"But election presupposes a *choice* of remedies, and where there is but *one remedy* available, there can be *no choice* of remedies and an unsuccessful pursuit of a *non-applicable remedy would not bar a resort to a remedy that is applicable.*"

See 234 Fed., page 536.

The trial court, as a matter of law, found that the employee *was* engaged in *interstate* commerce, and in view of this, Judge Knappen said:

"The Federal Act thus provided plaintiff's sole and exclusive remedy for his injuries. His *mere claim under the Michigan Act*, not prosecuted to recovery, was thus not an effective election as against a remedy under the Federal Act."

See 234 Fed., pages 536-537.

In the case at bar, Mrs. Hope did not make a claim under the Federal statute. She asserted no rights under the State statute. She asked nothing from the Compensation Board of Iowa other than that the Board leave her alone and not

interfere with the action of the administrator under a law of the United States.

She certainly cannot be deemed to have elected to take compensation under the Iowa statute. She could not make an election for the administrator.

In *Eric R. Co. v. Linnekoegel*, 238 Fed. 389, the Circuit Court of Appeals for the Second Circuit said:

"The assertion that a recovery under the Federal Act here invoked *can be in any way modified by the Workmen's Compensation Act* of the state in which the accident happened *certainly lacks authority*. It seems to us *unsustainable upon the reason of the matter*. It is the essential nature of any compensation act that it *does not depend upon or is not invoked as the result of an act of negligence*. What is assured to the workman thereby is not compensatory damages for a tort, but *a species of insurance* against hurts received in the line of occupation without (perhaps) anybody's fault. But Section 1 of the Liability Act (35 Stat. 65) declares that common carriers shall be liable 'in damages' for injuries due to their 'negligence.' *These words refer to a course and habit of litigation only too well known for some generations* and must be interpreted accordingly. *Damages mean what juries* assess according to their own views of value, and the act authorizing such damages *supersedes all state laws* relating to the same subject."

In *Director General v. Ronald*, 265 Fed. 138, it was said by Manton, Circuit Judge, concurring in an opinion of the Circuit Court of Appeals of the Second Circuit, that if the Federal Safety Appliance Act created a liability,

"The Workmen's Compensation Act \* \* \* has no application. *To allow the State Act to interfere would destroy the uniformity of the acts throughout the United States, and would result in weakening the force and effect of the Acts of the several states.*"

Let us suppose that Hope was killed by a violation of the Safety Appliance Act relating to automatic couplers; that he was killed in Iowa; and that he was *not* engaged in interstate commerce.

The position of the railway company, to be consistent, would be that his rights were governed by the Compensation Act and that although they arose out of the Federal statute, the Compensation Act would govern.

This is not the law and is inconsistent with the Ronald case just referred to.

In *Ross v. Schooley*, 257 Fed. 290 (certiorari denied, 249 U. S. 65, 63 L. Ed. 803), it was held that an employee *not* engaged in interstate commerce *could recover if injured by reason of a violation of the Federal Safety Appliance Act.*

It was further held that the Workmen's Compensation Act of Illinois *could not affect his right of recovery*, the court saying:

*"A state legislature, therefore, has no more power to curtail the Federal right of an employee than of a traveler."*

In the Ronald case, Judge Manton further said:

"It is beyond the power of any state to *interfere* with the *operation* of a Federal Act such as putting carriers and their employees to an election between its provisions and those of the New Jersey Compensation Acts (P. L. 1911, p. 134, as amended by P. L. 1913, p. 309) or im-



puting an election to them through a statutory presumption. The Federal Act is intended to operate uniformly in all the states as respects its application, rights and remedies conferred, and is therefore paramount and exclusive. *Erie R. Co. v. Winfield*, 244 U. S. 170, 37 Sup. Ct. 556, 61 L. Ed. 1057, Ann. Cas. 1918B, 662. A like result was reached in *Derine v. Buffalo R. & P. Ry. Co.*, 253 Fed. 948, 165 C. C. A. 390 (Third Circuit), and *Ewing v. Coal & Coke Ry. Co.*, 82 W. Va. 427, 96 S. E. 73, certiorari denied, 247 U. S. 521, 38 Sup. Ct. 583, 62 L. Ed. 1246."

In *Flanigan v. Hines*, 193 Pac. 1077 (Kansas), it was held that the amount of damages recoverable in an action predicated on the Federal Safety Appliance Act could not be governed by the Workmen's Compensation Act.

In its consideration of this matter, the court said:

"This court concludes that the redress of injury contemplated by the Safety Appliance Act is *full redress* by way of *damages*, and not merely the *recompense* afforded under the Workmen's Compensation Act, *which bases compensation on a theory incompatible with that of damages occasioned by fault.*"

In *Ward v. Erie R. Co.*, 129 N. E. 886, 230 N. Y. Sup. 230, it was held that the Federal Safety Appliance Act gave a right of action which could not be destroyed by a State Workmen's Compensation Act.

In speaking of the statute in that case, the court said:

"*The statute in scheme and framework is instinct with plan and purpose to maintain a remedy and fortify it. The will of Congress is expressed in abbreviated signs and symbols, but none the less it is expressed.*

Enough is there to forbid the imputation of a willingness that an act, described in its title as one to promote the safety of employees and travelers, *should be dependent for its efficacy upon the pleasure of the states.*"

The State, through its Compensation statutes, may not interfere with a right arising out of one of the Federal Safety Appliance Acts.

This is true, although the employee be *not* at the precise time of his injury *engaged in interstate commerce* so as to bring him within the provisions of the Employer's Liability Act.

This was the substance of the holding in *Texas & P. R. Co. v. Rigsby*, *supra*, and in *Ross v. Schooley*, 257 Fed. 290.

Taking this as a fact, that where the action arises out of a Federal statute the State *cannot* interfere, *even though the work be not interstate*, it would be extremely illogical to say that where the work is *in fact interstate* and the action is based on the Employer's Liability Act, the Commissioner can make an *adjudication* of interstate commerce, and *then* interfere with the Federal right.

In the cases under the Safety Appliance Act, the work *is* intrastate.

If in those cases, the Commissioner made an *adjudication* of intrastate commerce, it would be of *no effect*, and the mere determination of a *moot question*, where it was not *claimed* that an employee was engaged in interstate commerce.

It might as well be said in that class of cases that because the work *was* intrastate, the Compensation Act would apply.

In the case at bar, the *adjudication* of intrastate commerce by the Commissioner, when the plaintiff claims a Federal

right, makes the situation analagous to that in a case under the Safety Appliance Act where plaintiff *concedes* his work to be intrastate.

In such Safety Appliance, intrastate cases, the Commission may not interfere. Neither can it interfere because of the adjudication of intrastate commerce by the Commissioner.

#### THE CLAIM OF COLLATERAL ATTACK.

It being apparent from what has been said that the Federal Act generally speaking, is supreme, that states cannot interfere with remedies growing out of the Federal Safety Appliance Acts, even though no direct right of action be conferred thereby, and even though the employe be not engaged in interstate commerce, and it being beyond dispute that the Federal statute is paramount and exclusive, we come to the question of whether or not the exclusiveness of the Federal statute is lost, whether the supremacy of the paramount Federal right can be denied *under the guise of res judicata or estoppel*.

We contend that this cannot be.

Mr. Justice Dibell, in speaking for the Minnesota court, correctly expressed it when he said, in substance, that it *would be unseemly* to permit a Compensation Board, where the *proceedings are summary*, to quickly *spring into action* and defeat a *previously asserted Federal right*.

The states cannot defeat this right directly. To permit it to be defeated under the guise of estoppel or *res adjudicata* is to permit that to be done indirectly and in a round-about way, which the court would not permit to be done directly and in a straight-forward way.

If, under the guise of estoppel, the State can prevent the

exercise of a Federal right, that right is as much prevented and denied to an employee as though the State had directly denied it to him.

It makes little difference to an employee whether the State takes this course by *legislative enactment*, by *judicial decree*, or by *act of a Compensation Commissioner*.

All the employee knows is that the right Congress has given him has been taken away by the State.

Although an employee attempts to prevent this, his efforts being of no avail, because of the action of the Commission in giving no heed to the Federal statute, it is said that by this method, the Federal Act can be circumvented.

In other words, the law of Congress may be nullified.

This cannot be. The Supreme Law need not yield to a subordinate statute.

#### NO EQUITABLE ESTOPPEL.

Under the equitable doctrine of estoppel, the estoppel must be mutual. If we consider this question of mutuality for a moment, it will be apparent that there is no such mutuality.

Suppose in the Compensation proceedings, the Commissioner of Iowa had made an adjudication of *interstate* commerce, and that it had secured an affirmance of this adjudication by the District Court of Iowa, ripening the confirmation into a judgment.

Assume, then, that the personal representative—the only one who could bring the action under the Federal statute, had commenced a proceeding to recover damages on the theory that the employee was engaged in interstate commerce.

Assume that the personal representative made no proof of interstate commerce, but *offered in evidence the finding of the Commissioner to the effect that the employee was engaged in interstate commerce.*

Interstate commerce, like any other question under the Federal statute, must be affirmatively shown. Would this "*proof*," made by a "*finding*" in a proceeding in which the plaintiff was not a party, in a summary proceeding wherein a Compensation Commissioner had held decedent to be engaged in interstate commerce, be sufficient? Would this finding do away with the necessity of proof as known at common law?

Manifestly the plaintiff could not rely upon such adjudication, such proof.

Should the railway company contest the question of interstate commerce, it would avail plaintiff little to say that the railway company was estopped from making a contest because of the previous adjudication.

In the State of Mississippi it was provided, by legislative enactment, that under certain circumstances, a death would be *presumed* to have been caused by the *negligence* of the employing railway company.

The State act is known as the "*Prima Facie Negligence Statute.*"

This court in an action where the statute was set up, held that negligence was *an essential element which had to be proved under the Federal statute*, and that the State could not, by a legislative enactment, *do away with the proof required in order for plaintiff to recover.*

*New Orleans & N. E. R. Co. v. Harris*, 247 U. S. 367,  
62 L. Ed. 1167.

Neither could the plaintiff, in the supposititious case just

referred to rely on the *finding* of the Industrial Commissioner and offer this in evidence *in lieu of proof* that decedent was engaged in interstate commerce.

If the adjudication as to the commerce in which decedent was engaged could not be offered by *either party* as proof, clearly there is a lack of mutuality. It could not constitute "proof" under the Federal Act, hence it could not operate as a bar.

It can hardly be said that there is an *equitable* estoppel when there is *entire lack of equity* in the claim of the railway company.

Counsel concede that estoppel by judgment *in the broad sense* cannot be invoked, but claim that the court should have invoked the equitable doctrine of estoppel by *verdict*—that is, estoppel to question the matter of interstate commerce because of the finding of the Commissioner that the work was *intrastate*.

There was *no verdict* in the case, as is known at common law. The finding in Iowa was by the Industrial Commissioner.

If there be no estoppel by judgment, but the claim merely be made that the estoppel is by verdict, then the claimed constitutional question in this case falls.

The question of whether or not there is an estoppel by reason of the act of the Iowa Commissioner cannot raise a constitutional question under the full faith and credit clause.

The act of the Commissioner in making a finding cannot be called a judgment, and if the estoppel be merely by reason of this *finding*, then it presents solely a question for determination by the State court.

The full faith and credit clause pertains only to the judg-

ments and *judicial* acts and proceedings of a sister state. The finding of the Commissioner is only *a conclusion by an administrative officer*.

#### WHAT IS THE FINDING OF THE COMMISSIONER?

Much has been said in this proceeding relative to the finding of *the fact of interstate commerce*.

Strictly speaking, the Industrial Commissioner of Iowa did not find any fact, but rather came to *a conclusion of law* to the effect that Hope was engaged in intrastate commerce.

By this conclusion of law of the Commissioner, the plaintiff in the action under the Federal statute, could not be bound.

A conclusion of law by a Compensation Commissioner cannot be said to constitute *res adjudicata* as to the question of interstate commerce.

There could be no estoppel because of a finding of fact. The same facts were not before the Commissioner as were submitted to the District Court, in the case under the Federal statute.

Most startling consequences would result if the Compensation Commissioner of Iowa could be said to have power to *nullify the Federal Act* by rendering a decision before a court could get around to try a case under the Federal statute, proceeding according to the course of the common law.

The railway company says that Mrs. Hope should have continued the fight in Iowa.

It will be remembered that the *Special Administrator* was not a party to the Iowa proceedings, and also that Mrs.

Hope, while the beneficiary, was *not a party plaintiff in the Minnesota proceeding*.

Assuming that Mrs. Hope might have proceeded further in trying to stop the Commissioner from awarding her compensation in Iowa, it could be said with equal propriety that the railway company had a remedy in Minnesota—by applying to the Supreme Court and asking for a Writ of Prohibition to prevent the trial of the action in the District Court of Steele County, Minnesota.

We cannot escape the conclusion, on this branch of the case, that the Federal Act cannot be modified, hindered or interfered with by any Compensation proceeding.

This general proposition is agreed to by the railway company, but it is said that the interference by the State is permissible because of the doctrine of estoppel and *res adjudicata*. This does not answer the question. If the State cannot directly interfere with the operation of the Federal Act, it is prevented from interfering with it regardless of what method may be devised. It is the *fact of the interference*, and not the *means*, that is prohibited.

It seems irregular to resort to the Compensation Act in an attempt to defeat a Federal right, and then come into this court and make an assertion that under the full faith and credit clause of the Federal Constitution, due effect is not given to the acts and decrees of a sister state.

In putting into operation the Compensation proceedings, under the circumstances, the railway company was *running counter to the statutes of the United States*, the supreme law of the land.

From the *moment the Federal right was asserted*, the Commission was without power, right or authority to continue with the case.



The situation is not unlike that presented in the District Court in the trial of an action wherein facts are asserted which would give to a defendant the right to remove his case to the Federal Court.

The minute these facts are made to appear, the right to remove arises, and a State court can no longer proceed.

While it is true that there is some difference in the statutes, nevertheless the same reasoning prevails here, and when a *Federal right has been first asserted and an action commenced in a common law court to recover under the Federal statute*, it cannot be that a Compensation Commission, by reason of proceedings initiated before it by the adverse party can *take the cause away from the common law court and cause the matter in that court to be held in obedience until the determination by the Compensation Board*.

This sort of a proceeding *would make the Board superior to the courts, would make the State statute paramount, the Commissioner supreme*.

It is more reasonable and logical to say that when the Federal rights are first asserted in the common law court, a Compensation Commission is without any power or jurisdiction over the subject matter.

In this connection, it is to be borne in mind that while the Compensation Commission did acquire jurisdiction over *Mrs. C. Y. Hope*, it had *no jurisdiction over the subject-matter of the controversy*. It had no jurisdiction of the Federal cause of action. It had no jurisdiction over the Special Administrator.

The cause of action under the Federal statute could vest only in the personal representative. The Commission never acquired any jurisdiction over the personal representative,

nor the cause of action controlled by him.

*Not having such jurisdiction, it was without power to act in any way so as to bind the personal representative, or interfere with his cause of action.*

The proceedings under the State Act were entirely void and of no effect.

#### NO IDENTITY OF PARTIES.

Passing the point that the Industrial Commission of a state cannot initiate proceedings *so as to destroy a right given under the Federal statute*, and assuming generally for the purpose of the argument, that the Commission *might in some cases have the power to nullify the Federal statute*, we next come to the question of whether or not there was *identity of parties* in the two proceedings, so that the nullification could be accomplished.

It will be recalled that the Iowa proceeding was entitled: "In the Matter of the Award of Compensation on Account of the Death of C. Y. Hope, Deceased; Mrs. C. Y. Hope, Appellant v. Chicago, Rock Island & Pacific Railway Company, Appellee" (484-485).

The action under the Federal Act was entitled: "A. D. Schendel, as Special Administrator of the Estate of Clarence Y. Hope, Deceased, Plaintiff v. Chicago, Rock Island & Pacific Railway Company, Defendant."

Is there identity of parties?

The word, "identity" is defined in Funk & Wagnall's New Standard Dictionary as follows:

"The state or quality of being identical or absolutely the same."

There is no identity of parties in the present case and the

proceedings in Iowa; neither is there identity of subject-matter.

The trial court was of the opinion that the question of estoppel and *res adjudicata* was disposed of by the Troxell case, 227 U. S. 434, 57 L. Ed. 586, and other cases cited in his memorandum (585, 586, 590).

The present action is brought by A. D. Schendel, as Special Administrator of the Estate of Clarence Y. Hope, Deceased. The proceeding instituted in Iowa was instituted "In the Matter of C. Y. Hope, deceased" (Exhibit A, 428).

Through some change of which we are not advised, the case appears in Exhibit D, which is the arbitration finding by the Industrial Commission, as "Mrs. C. Y. Hope, Claimant v. Chicago, Rock Island & Pacific Railway Company, Defendant" (439).

Later Mrs. C. Y. Hope appears as appellant (472-476) and the railway company as appellee.

The judgment in the District Court is "In the Matter of the Award of Compensation on Account of the Death of C. Y. Hope, Deceased; Mrs. C. Y. Hope, Appellant" (484).

Is a judgment in the proceeding, as last entitled, a bar to the prosecution of the action by A. D. Schendel, as Special Administrator of the Estate of Clarence Y. Hope, because of identity of parties?

A very interesting case on the question of identity of parties is the case of *Ingersoll v. Coram*, 211 U. S. 335, 53 L. Ed. 208. This case is not exactly in point as to facts, but is very much in point on the proposition of identity of parties where an administrator is involved.

This case very clearly lays down the rule that an administrator in one state is not in such privity with an administrator in another state, that a judgment for or against

one on the same cause of action will bar the prosecution of a claim by the other.

Robert G. Ingersoll, in his lifetime, entered into a contract with certain parties to contest a will in Montana. The contest was to be made upon the basis of a contingent fee. There was a disagreement on the part of the jury on the first trial, and, pending a second trial, the matters involved were adjusted and Ingersoll's clients received a large amount in the settlement. Subsequently Ingersoll died and his wife, the plaintiff, was appointed administratrix of his estate in New York. As such administratrix she commenced an action in Montana to impress a trust upon the assets of the estate to the extent of the interest of her husband on account of fees. At the threshold of the case she was met with the objection that a foreign administratrix could not maintain the action, and she thereupon applied for the appointment of a local ancillary administrator. The application was granted and the ancillary administrator was substituted as party plaintiff. Upon the trial of the case the defendants objected to the introduction of any evidence on the ground that the bill did not state a cause of action. This objection was sustained and judgment entered for the defendant.

Later, it being discovered that there were assets of the estate in Massachusetts, Mrs. Ingersoll, as administratrix, commenced an action in that state of the same character as the one in Montana. In this action the Montana proceedings were set up as a bar to the proceedings in Massachusetts. We now quote the answer of the Supreme Court of the United States to the contention made:

"Respondents assert the identity of the action in Montana with the present suit, and upon that identity they urge that such action constitutes *res judicata*. Peti-

tioner denies the identity of the action, and urges besides that there is no such privity between the parties as to make the Montana action *res judicata* of the pending case. In support of the latter contention petitioner urges that an ancillary administrator in one jurisdiction is not in privity with an ancillary administrator in another jurisdiction, and that therefore a judgment against one is not a bar to a suit by the other. And this was the ruling of the Circuit Court. The Circuit Court of Appeals took the contrary view, and rested its judgment upon the conclusive effect of the Montana action. We shall assume that there is identity of subject-matter between the Montana action and that at bar, but the question remains: Was there identity of parties? An extended discussion of the question is made unnecessary by the case of *Brown v. Fletcher*, 210 U. S. 82, 52 L. Ed. 966. In that case a suit in equity against Fletcher, brought in his lifetime, was revived after his death, and a decree obtained. Fletcher resided in Michigan, where he died, leaving a will, which was duly probated in the Probate Court of Wayne County, in that state, in which the decree of the Massachusetts court was filed as evidence of a claim against the estate. Its effect as such was denied, and the case was brought here by writ of error. Replying to the contention of the plaintiff in error, that the Michigan executor and the administrator with the will annexed of Fletcher's estate in Massachusetts were in such privity that the decree was conclusive evidence of it in the proceedings in Michigan, this court held that the decree was not binding upon the Michigan executor, or the estate in his possession, citing *Vaughan v. Northrup*, 15 Pet. 1, 10 L.

Ed. 639; *Afpden v. Niron*, 4 How. 467, 11 L. Ed. 1059; *Stacy v. Thrasher*, 6 How. 44, 12 L. Ed. 337. The later case was quoted from as follows: 'Where administrations are granted to different persons in different states, they are so far deemed independent of each other that a judgment obtained against one will furnish no right of action against the other, to affect assets received by the latter in virtue of his own administration; for, in contemplation of law, there is no privity between him and the other administrator. See *Story Conflict of Laws*, Sec. 522; *Brodie v. Bickley*, 2 Rawle, 431.' *McLean v. Meek*, 18 How. 16, 15 L. Ed. 277; *Johnson v. Powers*, 139 U. S. 156, 35 L. Ed. 112, were also cited, and it was said that the doctrine was in force in Massachusetts.

"Respondents insist that this doctrine has no application to the Montana judgment, and urge that the latter is a bar of the pending suit (1), because it was a judgment on the merits, and (2), because such a judgment 'against an ancillary administrator in the suit brought by him is conclusive as to that cause of action against the domiciliary, or any other ancillary administrator.' And this is said to follow from the proposition which respondents advance that 'the authorized act of an ancillary administrator as to the property of the intestate within his jurisdiction is binding everywhere'; and it is hence conclusive that a suit brought by an ancillary administrator is subject to the same principle as an act done touching tangible property. That the argument by which this conclusion is supported has strength is established by the fact that the Circuit Court of Appeals yielded to it, and it is said to be sanctioned by *Biddle v. Wilkins*, 1 Pet. 686, 7 L. Ed. 315; *Wilkins v. Ellett*,

108 U. S. 256, 27 L. Ed. 718; *Talmadge v. Chappel*, 16 Mass. 71. But as these cases preceded *Brown v. Fletcher*, they must be regarded as consistent with it. Besides, in that case *Johnson v. Powers*, 139 U. S. 156, 35 L. Ed. 112, was cited as establishing on the authority of *Applen v. Nixon*, and *Stacy v. Thrasher*, *supra*; *Low v. Bartlett*, 8 Allen 259, the doctrine that a judgment recovered against the administrator of a deceased person in one state is no evidence of debt, in a subsequent suit by the same plaintiff in another state, either against an administrator, whether the same or a different person, appointed there, or against any other person having assets of the deceased. That there is a certain amount of artificiality in the doctrine was pointed out in *Stacy v. Thrasher*, and that it leads to the inconvenience and burdensome results of retrying controversies and repeating litigations. The doctrine, however, was vindicated as a necessary consequence of the different sources from which the different administrators received their powers, and the absence of privity between them, and that the imputations against it were not greater than could be made against other 'logical conclusions upon admitted legal principles.' It is not necessary, therefore, to review in detail the argument of respondents. Its fundamental concept is that the authorized act of an administrator as to property of the intestate within his jurisdiction is binding everywhere, and it is said that a suit brought by an administrator is subject to the same principle. The generality of the conclusion, however, counsel immediately limits by the concession that it does not include a suit brought against an administrator, whether he success-

fully or unsuccessfully defends it. In other words, the principle is true only of an action brought by the ancillary administrator to enforce a claim in behalf of the estate, and judgment goes against him. But counsel even limits this again, and says it would not be binding 'in the sense of creating a personal liability for costs, if costs be awarded, or otherwise, but it is binding in the sense that the cause of action has been effectively disposed of.' That is, as counsel explains, merged in the judgment. We do not think that the doctrine announced in *Brown v. Fletcher, supra*, admits of these distinctions, and surely the estoppel of a judgment must be mutual. The argument of respondents contends for the contrary; it makes a judgment against an ancillary administrator binding against other administrators, but not binding for them. We think, therefore, that the Montana judgment is not a bar to the pending suit."

It would be difficult to find a stronger case on the question of identity of parties and *res judicata* than the Ingersoll case.

It is to be noted that the court assumes identity of subject-matter, and that it asks the question, "Was there identity of parties?"

This question is answered by the holding that there was no such identity of parties and no such privity as would permit the judgment against one to bar an action against the other.

The court admits that there may be some artificiality in the doctrine but, nevertheless, lays down the rule that there is no privity between the administrator in one state and an administrator in another state.



The trial court was of the opinion that the case of *Troxell v. Delaware, L. & W. R. Co.*, 227 U. S. 434, determined the question of identity of parties.

In that case, the opinion was written by Mr. Justice Day. The action was brought by Lizzie M. Troxell, administratrix of the estate of Daniel Troxell. Plaintiff recovered a verdict in the court below and judgment was entered thereon.

The Circuit Court of Appeals reversed the judgment and the case then came to the Supreme Court of the United States.

It appears from the opinion that "Lizzie M. Troxell (now the administratrix of his estate) brought a previous action, suing as surviving widow, and joining the two living children, against the defendant railway company for damages."

She recovered a verdict and judgment was entered in her favor, but this was reversed by the Circuit Court of Appeals.

After this reversal, Lizzie M. Troxell was appointed administratrix, and brought an action to recover as administratrix. She again recovered a verdict and judgment was entered thereon.

The Circuit Court of Appeals reversed the judgment on the ground that the first proceeding and judgment constituted a bar to the maintenance of the second action. In other words, the Circuit Court of Appeals held that the judgment in the case of Lizzie M. Troxell against the railway company was a bar to the prosecution and recovery of the claim of Lizzie M. Troxell, as administratrix.

While there was an allegation which tended to show interstate commerce in the first case, the question was not presented to the jury and the case was "tried on the theory that it involved a cause of action under the state law of Pennsylvania."

The court then said:

"To work an estoppel the first proceeding and judgment must be a bar to the second one, because it is a matter already adjudicated *between the parties*."

The court then spoke of the *difference between the action under the State law and the action under the Federal law*, and said:

"The cause of action under the State law, if it could be prosecuted to recover for the wrongful death alleged in this case, was based upon a *different theory* of the right to recover than prevails under the Federal statute."

The court then cited *Ingersoll v. Coram, supra*, and *Brown v. Fletcher*, 210 U. S. 82, 52 L. Ed. 966, which was referred to and quoted from in the *Ingersoll* case, saying:

"Furthermore, it is well settled that to work an estoppel by judgment there must have been *identity of parties* in the two actions."

The court stated the position of the Circuit Court of Appeals as follows:

"The Circuit Court of Appeals in the present case, while recognizing this rule, disposed of the contention upon the ground that the parties were *essentially* the same in both actions (the first action was for the benefit of Lizzie M. Troxell and the two minor children, and the present case, although the action was brought by the administratrix, is for the benefit of herself and children); and held that, except in mere form, the actions were for the benefit of the same persons, and therefore the parties were practically the same; and that the omission to sue as administratrix was merely technical, and would have been curable by amendment."

The court then referred to *American R. Co. v. Birch*, 224 U. S. 547, 56 L. Ed. 879, to which we shall hereafter refer. Following that reference this statement was made:

"We think that under the ruling in the Birch case *there was not that identity of parties in the former action by the widow and the present case, properly brought by the administrator under the Employer's Liability Act*, which renders the former suit and judgment a bar to the present action."

There was in the Troxell case a concurrence in the opinion of the court by Mr. Justice Lurton, "solely because of the *lack of identity of the parties* in the two actions."

In the case of *American R. Co. v. Birch*, *supra*, the Supreme Court of the United States held that the action could be maintained only by the personal representative. The action was commenced by the widow, Ann Elizabeth Birch. The defendant contended that an administrator should have been appointed to prosecute the action.

Mr. Justice McKenna, who delivered the opinion of the court, said:

"In the present case it looks like a *useless circumlocution* to require an administration upon the deceased's estate, but in many cases it might be much the simpler plan and keep the controversy free from elements but those which relate to the cause of action. But we may presume that all contending considerations were taken into account and the purpose of Congress expressed in the language it used. \* \* \* *The national act gives the right of action to personal representatives only.*"

The judgment in favor of Mrs. Birch was accordingly reversed.

From the Troxell and Birch cases, the rule does not seem open to question.

Mrs. C. Y. Hope could not have maintained an action as widow under the Federal statute. Had she brought such an action the complaint would have been subject to demurrer.

The proceeding instituted by the railway company in Iowa to compel Mrs. C. Y. Hope to take compensation under the Iowa statute *is not the same* action as one by the personal representative.

There is no privity under the decision of the Troxell case and the Ingersoll case, *supra*.

As before stated, *the parties are not the same*, and under the Ingersoll and Troxell cases, they were not in privity.

It is a fundamental rule of law that there can be no estoppel by judgment or verdict unless the action be between the same parties or their privies.

The Troxell case was approved in the case of *Meyers v. International Co.*, U. S. Adv. O. No. 3, page 100, December, 1923. That was a bankruptcy proceeding and there the court held that the decision of the bankruptcy tribunal could be binding only on parties or their privies.

The Circuit Court of Appeals for the Second Circuit in a case like the one at bar also held that there was no identity of parties, following the reasoning of the Troxell and Ingersoll cases, *supra*.

See *Dennison v. Payne*, 293 Fed. 333.

In that case, the case of *Brown v. Fletcher*, 210 U. S. 82, 52 L. Ed. 966, upon which the Ingersoll case was largely based, is referred to with approval.

The Dennison case also followed the Troxell case, *supra*.

The court held that there was no identity of parties be-

tween the plaintiff in the Dennison case before the Federal Court and the plaintiff in the Compensation proceeding.

In the Dennison case, it appeared that the action was brought in a common law court under the Federal statute to recover damages for the death of an employee.

*Plaintiff*, after commencing the suit to recover damages under the Federal statute, also, in her individual name, *filed a petition* to be awarded compensation under the Pennsylvania Compensation Act.

The referee in the Compensation proceeding made an award to the plaintiff and also found specifically that decedent was engaged in intrastate commerce. This was done before the action under the Federal statute came to trial. The award was pleaded as a bar.

The Circuit Court of Appeals held that there was *no identity of parties* in the two proceedings and hence the *one could not be a bar to the other*.

It will be noted that in the Dennison case, *the claimant sought recovery herself* and was awarded recovery under the Compensation Act.

The trial court held that there could be no recovery in the case prosecuted under the Federal statute because of the award of the Compensation Board, and because decedent was not engaged in interstate commerce. This holding was overruled by the Circuit Court of Appeals.

In speaking of the Troxell case, 227 U. S. 434, the Circuit Court of Appeals said:

*"We are unable, in principle, to distinguish that case from the present suit. The fact that the plaintiff in the present suit obtained a decision in her favor on the cause of action involved in the suit which she brought before the state board, while in the Troxell case the*

plaintiff was defeated in the first suit, *can make no difference in the result*, as the case turned upon the fact that there was *not an identity of parties in the two actions.*"

The court further said :

"As was said by Mr. Justice Lamar, speaking for the court in *Lygon v. Perin Manufacturing Co.*, 125 U. S. 698, 700, 8 Sup. Ct. 1024, 1025 (31 L. Ed. 839) :

"It is well settled that in order to render a matter *res adjudicata*, there must be a concurrence of the four conditions, viz.: (1) *Identity in the thing sued for*; (2) *identity of the cause of action*; (3) *identity of persons and parties to the action*; and (4) *identity of the quality in the persons for or against whom the claim is made.*"

In the present suit there was *not identity of parties*, and *that is sufficient* to make the doctrine of *res adjudicata* inapplicable. As in our opinion the plaintiff's intestate was engaged in interstate commerce at the time of his death, and as the proceedings before the Pennsylvania state board were not between the same parties, they therefore cannot estop the plaintiff from maintaining the present suit. Error was, in our opinion, committed in the court below."

The Dennison case is one of the cases referred to in the brief of petitioner herein, on page 19, and also on page 6 of its Petition for Writ of Certiorari, wherein petitioner, referring to the decision of the Minnesota Supreme Court, said :

"The only two authorities in the country squarely in point hold contrary to the conclusion reached."

Citing *Williams v. Southern P. R. Co.*, 202 Pac.

356, 54 Cal. 571 (Certiorari denied, 258 U. S. 622).  
*Dennison v. Payne*, 293 Fed. 333 (C. C. A., 2nd  
 Circ.).

Later on in its brief, petitioner qualifies this statement by *criticising the Dennison case* because of the holding of lack of identity of parties.

The case is upheld by petitioner so far as it is authority for holding that a fact once determined by a body of competent jurisdiction cannot thereafter be reexamined.

Respondent's position here is that the cause of action was not the same in the two cases; that there was no identity of the thing sued for; that there was no identity of parties, and that the doctrine of *res adjudicata* could not apply.

It would indeed seem strange that the railway company might prevent the prosecution of this action *because of a suit brought by it or a proceeding initiated by it against Mrs. Hope* who was *not a party to the present action*.

#### ESTOPPEL—RES ADJUDICATA.

The petitioner in the case at bar qualified its claim by making the general statement that though the Iowa proceeding be not a bar in entirety, it is nevertheless a bar *so far as the finding of fact* of intrastate commerce is concerned.

If the judgment be not a bar *in its entirety* but merely a bar *as to that particular fact*, it is *just as much a bar as though it were a bar in entirety*.

The fact of interstate commerce had to be proved by the plaintiff. If plaintiff was barred by the Iowa adjudication of *intrastate commerce*, *plaintiff's whole cause of action had to fall*.

On the question of *res judicata*, counsel cite a number of

cases. It is to be noted that in all of these cases, where it is said a judgment in a previous action is *res judicata* as to a fact litigated in that action, there is a further statement that this doctrine applies to another action "*between the same parties,*" or "*upon the same matter.*"

The actions are *not between the same parties*; nor are they based upon the same matter. We are dealing with *different causes of action, different parties plaintiff*, and the cases cited by counsel, while correctly stating the law where applicable, do not apply to the present situation.

If we sum up all of the claims of the railway company in this case, the best that can be said is that there is an admission that the Federal Act is supreme; that the Iowa judgment is not a bar in *entirety*, and does not *wholly* bar the cause of action, but that it does bar the one question of interstate commerce because that fact was found by the State Commissioner.

That finding under all the cases dealing with *res judicata*, cannot bind anyone who is *not a party* to the original suit unless they were in privity with such party.

There being no such privity, they cannot be bound.

We very respectfully submit to the court that there was no identity of parties under the decisions in the following cases:

*Troxell v. Delaware, L. & W. R. Co.*, 227 U. S. 434, 57 L. Ed. 586.

*Ingersoll v. Coram*, 211 U. S. 335, 53 L. Ed. 208.

*Dennison v. Payne*, 293 Fed. 333.

The Dennison case last referred to is squarely in point as to facts.

The petitioner in the case at bar states that the Troxell case is not in point because the first holding was that the



widow could *not* recover. Because the first adjudication was to the effect that she could *not* recover, it is claimed the case is different from the case at bar, where *a recovery was awarded* to Mrs. Hope by the Iowa Commission.

In the case of *Dennison v. Payne*, the Compensation Board did award compensation to the widow and the fact that this award was made was held not to be a bar to the case under the Federal Act because there was no identity of parties.

#### THE WILLIAMS CASE.

Counsel has laid great stress on the case of *Williams v. Southern P. R. Co.*, 202 Pac. 356, and have stated in their brief that this case determines the matter here at issue.

Let us see what the Williams case is. Ruth Williams, as administratrix, brought an action to recover damages under the Federal Act. For fear she might not recover under the Federal Act and wishing to get the limited compensation allowed by the State statute, *she, herself*, in her individual capacity, also made application to the Industrial Commission for compensation.

The Commissioner refused to stay its proceedings pending the determination of the action at law under the Federal statute. Before she got to try her case under the Federal Law, the Commission acted on her application and an award of \$5,000 was made to her under the State Compensation Act.

The California court in that case reviewed a lot of decisions, most of them not in point and of no moment, and then *reached a conclusion at variance with the decision of the Supreme Court of the United States in the Trorell case*. For instance, in that part of the decision quoted at the bottom of page 47 of appellant's brief, it is said:

"Where two tribunals have concurrent jurisdiction over the same parties and subject-matter, the tribunal where jurisdiction first attaches, retains it exclusively."

No compensation body in California, or any place else, has *concurrent* jurisdiction of an action to recover damages *under the Federal statute*.

The court then refers to the matter of *res judicata* and cites the Troxell case. We have read the Williams decision with great care, in an attempt to find in it the distinction between the Troxell case and the case at bar, but the Williams case does not show such distinction.

Counsel for the railway company quote from and refer to the Williams case, laying stress on the holding that the fact "so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified."

As to this general rule, where applicable, there is no quarrel, but the Troxell case and the Ingersoll case show that the Supreme Court of the United States has taken the position that the parties are *not the same*, nor in privity.

The Williams case refers to the Troxell case, but *does not distinguish anything therein decided*.

On page 44, the doctrine of a *whole* estoppel, or of an action not being *wholly* barred is enunciated, but, as we have heretofore said, if the Industrial Commission's judgment was valid on the question of interstate commerce, it is immaterial as to its effect on any other question because *that* is the *whole* case.

It is folly to say that the judgment does not *wholly* bar the cause of action, but simply determines the *main issue* upon which the recovery in the second action depends. Fur-

ther the court in the Williams case, uses this language, in reference to the decision of this court in the Troxell case:

"The question whether an issue actually determined in the first was conclusive on the same issue in the second as against a recovery for the benefit of Mrs. Troxell was not before the court."

This hardly squares with the fact. The Circuit Court of Appeals held that the judgment in the first Troxell case brought by Lizzie M. Troxell, *was a bar to her right to maintain the second action*. It is true the court did not attempt to *split up all the elements of the cause of action*, but the following language of the California court is not justified and is not correct:

"The decision goes no further than to hold that because there was not identity of parties plaintiff in the two actions, the second was not *wholly* barred by the judgment in the first."

There is nothing in the Troxell case to warrant this conclusion by the California court.

In reversing the Circuit Court of Appeals, because that court held that the judgment in the first suit barred the prosecution of the second suit certainly the Supreme Court of the United States *did have before it the question of whether or not the issues determined in the first case barred a recovery in the second case*.

It is also to be remembered that in the Williams case, Mrs. Williams herself *sought* compensation before the Board, while in the present case the *scheme* was engineered by the railway company.

Ruth Williams in that case was a party to that proceeding. A. D. Schendel, as Special Administrator in the case

at bar, was *not* a party to the proceeding in Iowa.

We do not believe that the Williams case, a decision of a state court, which unsuccessfully attempts to distinguish the Troxell case, and which is contrary to it, and which is contrary to the cases of *Ingersoll v. Coram* and *Dennison v. Payne, supra*, can be taken as authority for holding that the State Act is supreme, that *there is identity* of parties in the two proceedings and the Federal right barred.

The Supreme Court of the United States has said that there was not such identity.

*Ingersoll v. Coram* and the cases upon which it is based, together with the Troxell case, have never been reversed or criticised by this court.

The question of identity of parties is not, therefore, an original one, but it has already been determined by this court.

In *Spokane & I. E. R. Co. v. Whitley*, 233 U. S. 487, 59 L. Ed. 1061, certain general principles of law applicable to the facts in the case at bar are given.

We quote the syllabus of the decision:

"The *mother's right* to sue in Idaho as an heir under Id. Rev. Codes, No. 4100, upon a claim for damages for the negligent killing of her son, which was created for the benefit of his heirs by that statute, *is not barred by a judgment of a Washington court in an action upon such statutory liability*, brought by the administratrix appointed under the laws of Tennessee, to which action *the mother was not a party*, and in which, because brought without her sanction, she could not, under the Idaho statute, have been represented by the administratrix; nor is any different conclusion demanded because of a subsequent unsuccessful attempt by the

mother in the Tennessee courts to obtain a share in the proceeds of the recovery in the Washington suit."

The opinion was written by Mr. Justice Hughes, the concluding paragraph of which is as follows:

"It is apparent that the railroad company co-operated with the administratrix in securing the judgment in her favor, without bringing the mother in as a party, and without demanding that proof of authorization of the suit by the mother should be furnished. Had the railroad company made such a demand, there is no reason to believe that it would not have been sustained. Relying upon what appears to be an erroneous construction of the Idaho statute, it preferred to facilitate the administratrix in obtaining the recovery in the absence of the mother, and without its being shown that the suit was brought in her interest and with her authority, and the predicament in which it now finds itself is due solely to its own conduct."

This statement might well be made with reference to the decision of the railway company in the case at bar.

While the railway company did not co-operate with Mrs. Hope in procuring the adjudication before the Iowa Compensation Board, it did initiate the proceedings and had the award made "without demanding proof" that the cause of action was not being maintained by an administrator under the Federal statute. In fact the railway company had been specifically advised of this.

Mr. Justice Hughes further said:

"If she (the mother) was *not represented by the administratrix*, the Washington court was *without jurisdiction as to her*, and the Idaho court was not bound to

*treat the judgment as a bar to her recovery in the present suit."*

The same thing is true in the case at bar. The Administrator, A. D. Schendel, was *not a party to the Iowa Compensation proceeding*, and he *certainly was not represented in that proceeding by Mrs. Clarence Y. Hope*.

Therefore, the Compensation Commission *was without jurisdiction as to him*, and the Minnesota court was *not bound to treat the finding of the Commission in favor of Mrs. Hope as a bar to a recovery by A. D. Schendel, as Special Administrator, in the present suit*.

### CONCLUSION.

We submit that the question of whether or not Hope was engaged in interstate commerce, when his last work was the setting of the brakes on two interstate cars, can be decided only one way.

Under the adjudicated cases his work was interstate as a matter of law.

To start with, then, we have *an employee engaged in interstate commerce, pursuing a Federal right*.

After starting *his* action in a court of competent jurisdiction, as known at common law, the railway company initiated proceedings under a State Compensation Act in an attempt to defeat his Federal right.

We contend that the Compensation Commissioner *did not have jurisdiction* of the subject-matter and did not have jurisdiction of the Administrator; that after the assertion of the Federal right, he was wholly without authority to proceed in the matter.

We further contend that because the Federal law is su-

preme and paramount, the Compensation Act cannot be used to *hinder, delay or interfere with* the plaintiff in the prosecution of his Federal right.

The conclusion follows that if this cannot be done *directly*, it cannot be done *indirectly under the guise of res adjudicata or equitable estoppel*.

The question of lack of identity of parties has been determined in several cases by this court, and this question is not one now open to further consideration by the court.

The Troxell case has settled the point.

In this controversy, involving a conflict between a law of the United States and a Compensation proceeding, wherein the State Commissioner seeks to hinder, delay, interfere with, and prevent the exercise of a Federal right, we very respectfully submit to this court that the Commissioner so proceeding cannot interfere with a Federal right. He must yield to the law of the United States, which is exclusive, paramount and supreme.

To hold otherwise would be to set the Federal statute at naught, and would amount to a nullification of a law of Congress by the action of an Industrial Commissioner.

Respectfully submitted,

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Attorneys for Respondent.

(12)

H-97

# SUPREME COURT OF THE UNITED STATES.

Nos. 683 and 684.—OCTOBER TERM, 1925.

Chicago, Rock Island & Pacific Rail-  
way Company, Petitioner,

683

*vs.*

A. D. Schendel, as Special Adminis-  
trator of the Estate of Clarence Y.  
Hope, Deceased.

Chicago, Rock Island & Pacific Rail-  
way Company, Petitioner,

684

*vs.*

Fred A. Elder.

270

On Writs of Certiorari to  
the Supreme Court of  
the State of Minnesota.

[April 12, 1926.]

Mr. Justice SUTHERLAND delivered the opinion of the Court.

These cases grow out of an accident on the line of the railway company in Iowa, in which Hope was killed and Elder was injured under circumstances establishing the negligence of the railway company and its consequent liability for damages. The defense in each case was that the controlling issue had become *res judicata*. In the *Hope* case, petitioner pleaded a final judgment, entered, under the Iowa Workmen's Compensation Law, by an Iowa state court of record possessing general jurisdiction, and, in the *Elder* case, a decision made by a deputy industrial commissioner appointed under the same law. In both cases, the full faith and credit clause of the federal Constitution was invoked. At the trials in the Minnesota district court, the judgment in the one case and the decision in the other, together with a copy of the Iowa Workmen's Compensation Law, all properly authenticated, were offered in evidence in support of the plea, but, upon objection, excluded. Verdicts against the railway company were rendered and judgments entered accordingly. Appeals to the state supreme court followed. The action of the Minnesota district court in refusing to give effect to the Iowa judgment and decision was assigned as error and duly



challenged as denying them the full faith and credit enjoined by the federal Constitution; but the Minnesota supreme court, upon full consideration, sustained the trial court in that respect and affirmed both judgments. — Minn. —.

The Iowa Workmen's Compensation Law is elective in form. Hope and Elder were residents of Iowa and employees of the railway company, and it is not in dispute that they and the company had elected to be bound by its provisions. The statute will be found in the Code of Iowa, 1924, § 1361, *et seq.* It adopts a schedule of compensation; creates the office of industrial commissioner, and authorizes him to appoint a deputy, make rules and regulations not inconsistent with the act, summon witnesses, administer oaths, etc.; and contains other provisions, not necessary to be stated, for its administration and enforcement. If the parties fail to reach an agreement in regard to the compensation, the commissioner, at the request of either party, is directed to form a committee of arbitration to consist of three persons, one of whom shall be the commissioner, the others to be named by the parties, respectively. The arbitrators are directed to hear the case and decide the matter. Their decision, together with a statement of the evidence, findings of fact, rulings of law and other pertinent matters, must then be filed with the commissioner. At the end of five days after such filing, unless a review is sought in the meantime, the decision becomes enforceable. Upon the application of any party in interest, the commissioner may review the decision; and, if any party be aggrieved by reason of his order or decree thereon, such party may appeal to the state district court having jurisdiction, in the manner and upon the grounds set forth in the act. The judgment of that court is given the same effect as though rendered in a suit duly heard and determined therein; and an appeal from it lies to the supreme court of the state.

No. 683.

In the *Hope* case, the action was brought in the Minnesota district court on February 21, 1923, under the Federal Employers' Liability Law for the sole benefit of the surviving widow. Thereafter, on March 2, 1923, the railway company instituted a proceeding before the Iowa Industrial Commissioner under the Iowa Workmen's Compensation Act. To this proceeding the decedent's widow was made a party, as the sole beneficiary under the act. The rail-

way company asked for an arbitration. The widow answered, asserting that the compensation act did not apply because the company and the deceased were both engaged in interstate commerce at the time of the accident. Arbitrators were appointed, though the widow did not join in their appointment. The arbitrators found that deceased was engaged in intrastate commerce and that the case was governed by the compensation act, and awarded compensation to the widow. Thereupon, the widow filed an application in review with the commissioner. That officer reviewed the facts, specifically found that the deceased was engaged in intrastate commerce, and approved the award. The widow then appealed to the district court of Lucas County, Iowa, and that court, on June 2, 1923, specifically held that the deceased was engaged in intrastate commerce and entered final judgment affirming the award. Thereafter, on March 4, 1924, the present action was heard in the Minnesota district court and verdict and judgment rendered for respondent.

The Minnesota supreme court held that the plea of *res judicata* was bad for two reasons: (1) that "the substantive right given the employe or his representative by Congress under express constitutional grant, with the courts to which he may go for its enforcement pointed out to him, is a superior substantive right; and that when he or his representative has chosen the forum to which to submit his cause, he cannot, against his objection and upon the initiative of his employer, be required to submit it in a summary proceeding commenced later under a compensation act;" and (2) that there was a lack of identity of parties, since under the Iowa statute the right of recovery is in the beneficiary while under the federal act the right is in the personal representative.

1. It is evident from the opinion, that the court formulated the first reason with some hesitation. It is elementary, of course, that, in any judicial proceeding, the arrangement of the parties on the record, so long as they are adverse, or the fact that the party against whom the estoppel is pleaded was an objecting party, is of no consequence. A judgment is as binding upon an unwilling defendant as it is upon a willing plaintiff. Nor is it material that the action or proceeding, in which the judgment, set up as an estoppel, is rendered, was brought after the commencement of the action or proceeding in which it is pleaded. Where both are *in personam*, the second action or proceeding "does not tend to impair or defeat the jurisdiction of the court in which a prior

action for the same cause is pending. Each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court. Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principles of *res judicata* by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case. The rule, therefore, has become generally established that where the action first brought is *in personam* and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded." *Kline v. Burke Constr. Co.*, 260 U. S. 226, 230.

It is urged in behalf of respondent, that the federal act is supreme and supersedes all state laws in respect of employers' liability in interstate commerce. That is quite true; but it does not advance the solution of the point in dispute, since it is equally true that, in respect of such liability arising in intrastate commerce, the state law is supreme. Judicial power to determine the question in a case brought under a state statute is in no way inferior or subordinate to the same power in a case brought under the federal act.

The Iowa proceeding was brought and determined upon the theory that Hope was engaged in intrastate commerce; the Minnesota action was brought and determined upon the opposite theory that he was engaged in interstate commerce. The point at issue was the same. That the Iowa court had jurisdiction to entertain the proceeding and decide the question under the state statute, cannot be doubted. Under the federal act, the Minnesota court had equal authority; but the Iowa judgment was first rendered. And, upon familiar principles, irrespective of which action or proceeding was first brought, it is the first final judgment rendered in one of the courts which becomes conclusive in the other as *res judicata*. *Boatmen's Bank v. Fritzlen*, 135 Fed. 650, 667; *Merritt v. American Steel-Barge Co.*, 79 Fed. 228, 234; *Williams v. Southern Pac. Co.*, 54 Cal. App. 571, 575. And see *Insurance Co. v. Harris*, 97 U. S. 331, 336, where the rule as stated was recognized.

The Iowa court, under the compensation law, in the due exercise of its jurisdiction, having adjudicated the character of the commerce in which the deceased was engaged, that matter, whether

rightly decided or not, must be taken as conclusively established, so long as the judgment remains unmodified. *United States v. Moser*, 266 U. S. 236, 241, and cases cited. And, putting aside for the moment the question in respect of identity of parties, the judgment upon the point was none the less conclusive as *res judicata* because it was rendered under the state compensation law, while the action in which it was pleaded arose under the federal liability law. *Dennison v. Payne*, 293 Fed. 333, 341-342; *Williams v. Southern Pac. Co.*, *supra*, pp. 174-175.

2. In the Iowa proceeding, the widow of the deceased was a party in her own right and clearly was bound by the judgment. The action in Minnesota, however, was brought by the administrator, and the state supreme court, on the authority of *Dennison v. Payne*, *supra*, pp. 342-343, held that there was a want of identity of parties. The decision in the *Dennison* case rests entirely on *Troxell v. Del., Lack. & West. R. R.*, 227 U. S. 434. The effect of the last named case we pass for later consideration.

Hope's death as the result of the negligence of the railroad company gave rise to a single cause of action, to be enforced directly by the widow, under the state law, or in the name of the personal representative, for the sole benefit of the widow, under the federal law, depending upon the character of the commerce in which the deceased and the company were engaged at the time of the accident. In either case, the controlling question is precisely the same, namely, was the deceased engaged in intrastate or interstate commerce? and the right to be enforced is precisely the same, namely, the right of the widow, as sole beneficiary, to be compensated in damages for her loss. The fact that the party impleaded, under the state law, was the widow, and, under the federal law, was the personal representative, does not settle the question of identity of parties. That must be determined as a matter of substance and not of mere form. The essential consideration is that it is the right of the widow, and of no one else, which was presented and adjudicated in both courts. If a judgment in the Minnesota action in favor of the administrator had been first rendered, it does not admit of doubt that it would have been conclusive against the right of the widow to recover under the Iowa compensation law. And it follows, as a necessary corollary, that the Iowa judgment, being first, is equally conclusive against the administrator in the Minnesota action; for, if, in legal contem-

plation, there is identity of parties in the one situation, there must be like identity in the other.

The first proposition finds support in *Heckman v. United States*, 224 U. S. 413, 445-446, where this court held that the United States had capacity to maintain a suit to set aside conveyances made by Indian allottees of allotted lands and that the allottees need not be joined. The defendant in that case insisted that, unless the allottees who had executed the conveyances were brought in as parties, he was in danger of being subjected to a second suit by the allottees. Answering that contention, this court said:

"But if the United States, representing the owners of restricted lands, is entitled to bring a suit of this character, it must follow that the decree will bind not only the United States, but the Indians whom it represents in the litigation. This consequence is involved in the representation. *Kerrison v. Stewart*, 93 U. S. 155, 160; *Shaw v. Railroad Co.*, 100 U. S. 605, 611; *Beals v. Ill. & C. R. R. Co.*, 133 U. S. 290, 295. And it could not, consistently with any principle, be tolerated that, after the United States on behalf of its wards had invoked the jurisdiction of its courts to cancel conveyances in violation of the restrictions prescribed by Congress, these wards should themselves be permitted to relitigate the question."

And, conversely, in *United States v. Des Moines Valley R. Co.*, 84 Fed. 40, where a suit in the name of the government was brought to enforce the right of a private party, it was held that a prior adverse adjudication by a state court in a suit against him personally, determining the same issues, was available as an estoppel against the government. The ground of the decision was thus stated (pp. 44-45):

"Inasmuch, then, as the government sues for the sole benefit of Fairchild, and for the professed purpose of reinvesting him with a title which he has lost, we are of opinion that, whether the present action be regarded as brought under the act of March 3, 1887 (24 Stat. 556, c. 376), or as brought in pursuance of its general right to sue, the government should be held estopped by the previous adjudications against the real party in interest in the state court. The subject-matter and the issue to be tried being the same in this proceeding as in the former actions, the losing party on the former trials ought not to be permitted to renew the controversy in the name of a merely nominal plaintiff, and thereby avoid the effect of the former adjudications. *Southern Minnesota Railway Extension Co. v. St. Paul & S. C. R. Co.*, 12 U. S. App. 320, 325, 5 C. C. A. 249, and 55 Fed. 690. This doctrine was applied by this court in the case of *Union Pac. Ry. Co. v. U. S.*, 32 U. S. App. 311, 319,

15 C. C. A. 123, and 67 Fed. 975, which was a suit brought by the United States under the act of March 3, 1887, wherein we held that the United States was bound by an estoppel which might have been invoked against the real party in interest if the suit had been brought in his name, because it appeared that the United States had no substantial interest in the controversy, and was merely a nominal plaintiff."

Since the statutory authority of the administrator is to sue, not in his own right or for his own benefit or that of the estate, but in the right and for the sole benefit of the widow, the same principles are applicable, in accordance with the general rule that "whenever an action may properly be maintained or defended by a trustee in his representative capacity without joining the beneficiary, the latter is necessarily bound by the judgment." 1 Freeman on Judgments, 5th Ed., § 500. Identity of parties is not a mere matter of form, but of substance. Parties nominally the same may be, in legal effect, different, Bigelow on Estoppel, 6th Ed., 145; and parties nominally different may be, in legal effect, the same. *Calhoun's Lessee v. Dunning*, 4 Dall. 120, 121; *Follansbee v. Walker*, 74 Ia. St. 306, 309; *In re Estate of Parks*, 166 Iowa 403.

In the *Follansbee* case, a judgment against Joshua Follansbee alone was held available as an estoppel in another action brought by Walker & Follansbee for the use of Joshua. Justice Sharswood, speaking for the court, said:

"The parties in that suit and in the action tried below were substantially the same. In the former, Joshua Follansbee was the legal, in the latter, he is the equitable plaintiff. The subject-matter of the two suits appeared by the record to be identical. The presumption would be upon the issues, that the merits had been passed upon in the former proceeding. Such being the case, if no technical objection appeared to have been raised upon the record to the right of Joshua Follansbee to maintain the action as legal plaintiff, the judgment in that action would be a bar to a subsequent action by him as equitable plaintiff. If it appeared that only the equitable, not the legal right, was in Joshua Follansbee, it would be presumed that the defendant had waived that purely technical objection. It would be very unreasonable and contrary to the settled rules upon the subject, to permit the plaintiff having once been defeated on the merits, to try the same question over again in a different form."

In the *Parks* case, a judgment against the sole beneficiary of an estate in her individual capacity, was held conclusive in a subse-

quent action by the same plaintiff against the same defendant as administratrix, on the ground that, while theoretically the former suit was not against the same defendant as administratrix, nevertheless she was the sole beneficiary of the estate and represented only herself in each case.

In *Corcoran v. Chesapeake, etc. Canal Co.*, 94 U. S. 741, 745, this court, holding that a judgment against a trustee for bondholders was conclusive in a suit involving the same subject-matter, brought by him in his individual character, said: "It would be a new and very dangerous doctrine in the equity practice to hold that the *cestui que trust* is not bound by the decree against his trustee in the very matter of the trust for which he was appointed." See also, *Kerrison, Assignee v. Stewart et al.*, 93 U. S. 155, 160; *Spokane Inland R. R. v. Whitley*, 237 U. S. 487, 496; *Estate of Bell*, 153 Cal. 331, 344; *Chandler v. Lumber Co.*, 131 Tenn. 47, 51.

Upon facts almost identical with those now under review, it was held in *Williams v. Southern Pac. Co.*, *supra*, pp. 571, 576, that there was a substantial identity of parties and that a judgment for the widow under the California compensation act was available as an estoppel in a prior action brought by her as administratrix under the federal act.

It remains only to consider the bearing of the *Troxell* case, *supra*, upon this point. Mrs. Troxell, the widow of a deceased employee, sued the railroad company under a state statute, for the benefit of herself and minor children, to recover for the death of her husband resulting from a negligent failure to provide safe instrumentalities. There was a judgment against her. She then brought suit under the Federal Employers' Liability Act, as administratrix, averring the negligence of a fellow-servant, a ground of recovery which was not available to her in the action under the state statute. It was held, following the general rule, that, the cause of action in the two cases being different and the issue determined in the first not being involved in the second, there was no estoppel. This was decisive of the case, but the court proceeded to say that, furthermore, there was not an identity of parties in the two actions. Two former decisions of this court are cited,—*Brown v. Fletcher's Estate*, 210 U. S. 82, and *Ingersoll v. Coram*, 211 U. S. 335. Both cases, following the well-established rule, simply decide that there is no privity between administrators appointed in different states, since the authority of an executor or administrator appointed in



one state does not extend to the property or administration in another state.

Whether, in the light of the foregoing views, we now should hold that where, as in the *Troxell* case, the rights of additional beneficiaries, not actual parties to the first judgment, are involved, the requirement of identity of parties is unsatisfied, is a question we do not feel called upon here to reexamine; since we are clear that such requirement is fully met in the situation now under consideration, where the sole beneficiary was an actual party to the proceeding under the state law, and present by her statutory representative in the action under the federal law, and no other rights were involved.

No. 684.

In the *Elder* case, as in the case just considered, the railway company began a proceeding before the industrial commissioner. Elder answered, averring that he was engaged in interstate commerce at the time of the injury. The parties stipulated that the commissioner or his deputy should take the place of the arbitration committee; and the deputy commissioner, pursuant to the stipulation, heard the matter and filed his decision. Thereupon, Elder applied for a review by the commissioner, under the statute, but no action had been taken upon that application by the commissioner at the time the judgment was rendered in the Minnesota court. Under the Iowa statute, therefore, the decision had not ripened into an enforceable award; and we are not called upon to determine what, in that event, would have been its effect as an estoppel. The proceeding being still *in fieri* when the Minnesota case was tried and determined, the doctrine of *res judicata* is not applicable. There must be a final judgment. Bigelow on Estoppel, 6th Ed., p. 64; *Webb v. Buckelew et al.*, 82 N. Y. 555, 559-560.

It follows that the judgment in the *Hope* case must be reversed and that in the *Elder* case affirmed.

*No. 683, Judgment reversed and cause remanded for further proceedings not inconsistent with this opinion.*

*No. 684, Judgment affirmed.*